STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May Term, A. D. 1955

General No. 10006 Agenda No. 8

D. D. Baber,

Plaintiff-Appellant,

vs.

Hardin Grain Company, a corporation,

Defendant-Appellee

Appeal from
Circuit Court of
Edgar County

CARROLL, P.J.

Plaintiff appeals from a judgment of the Circuit Court of Edgar County in favor of defendant entered upon a jury verdict. Plaintiff's motion for judgment notwithstanding the verdict and, in the alternative, for a new trial, was denied.

The action is the result of a dispute between the parties over the selling price of a quantity of corn. Facts disclosed by the record as undisputed are that plaintiff, a farmer owning land near Kansas, Illinois, was the owner of a crib of white corn; that defendant was in the grain business; that in September, 1948, defendant, after some conversations with plaintiff and his son, Adin Baber, purchased the crib of corn; that some of the corn had been damaged by water, a fact known to both parties; that defendant's employees sorted and shelled the corn and conveyed the same to the defendant's elevator; that a government test was made and the corn graded No. 5; that in paying

for the corn, defendant deducted 59 cents per bushel for market price of No. 2 corn, which was at that time $2.43 per bushel; that the price paid plaintiff was the then market price for No. 5 corn; that defendant paid plaintiff the sum of $2,966.34 and the claim of plaintiff is for $951.08, the difference between the amount paid plaintiff and the selling price computed at $2.43 per bushel.

It is plaintiff's contention that defendant agreed to pay for the corn at the rate of $2.43 per bushel regardless of its grade or condition; that the defendant claimed an implied warranty as to the quality of the corn; that the evidence preponderated in favor of the plaintiff and the trial court erred in refusing to grant plaintiff a new trial. Plaintiff further contends for error on the part of the trial court in refusing two instructions tendered by plaintiff.

The evidence as to the terms of the contract is in conflict. D. D. Baber testified that H. P. Hardin, officer of the defendant's company, talked with him concerning the purchase of the crib of corn in question; that he told Hardin he would have to close the deal with Adin Baber, witness's son; that Hardin stated he had looked at the corn, some of which was damaged; that the corn must be sorted and the damaged corn thrown out; that this was agreeable to witness; that Hardin said he had an opportunity to ship the corn for use in making artificial snow; that he told Hardin he was not familiar with the price of the corn; that he saw Hardin after the corn had been delivered and asked him what the price was and that Hardin said "Two forty-three."

Adin Baber testified he represented his father in the sale of the corn; that he told Hardin his father was willing to accept defendant's offer for the corn; that he did not tell the defendant what the

price was, but that his father had told him it was $2.43 per bushel.

H. P. Rardin testified he bought the corn from Adin Baber when he came to defendant's office; that Baber asked witness what he would give for the corn and witness stated $2.43 for milling corn; that the reply of Adin Baber was "Go get it and see what you can do with it"; and that defendant shelled the corn and transported it to the elevator.

The foregoing appears to be the substance of the testimony of the parties as to their conversations concerning the price which defendant agreed to pay for the corn. It goes without saying that the evidence as to the terms of the contract is in serious conflict. In such a situation it was the province of the jury to determine the disputed fact questions as to the terms of the contract and to make such determination from the testimony of the witnesses and the other facts and circumstances in evidence. Hanck v. Ruan Transport Corp., 3 Ill. App. 2d 372; Krensky v. Metropolitan Trust Co., 4 Ill. App. 2d 14.

It is the well established rule that unless the verdict of the jury is manifestly and palpably against the weight of the evidence it will not be disturbed by a reviewing court. Aldridge v. Morris, 337 Ill. App. 369; Heil v. Kastengren, 328 Ill. App. 301; In re Matter of Gleeson, 1 Ill. App. 2d 409.

We think there is ample evidence in this record sustaining the jury's verdict. The jury saw and heard the witnesses and apparently accepted defendant's version of the agreement as to the price he was to pay for the corn. There appears to be no evidence warranting consideration by the jury of the question of an implied warranty on

the part of the plaintiff as to the condition of the corn. We find nothing in the record indicating any contention by defendant that plaintiff warranted the corn to be of any certain grade. Both parties admitted knowledge of the fact that some of the corn had been damaged by water. Plaintiff's contention that defendant agreed to pay for the corn without reference to its quality is inconsistent with his argument that defendant relied upon an implied warranty. This being true, there would seem to be no reasonable basis for any inference that defendant would offer to pay the then market price for No. 2 milling corn when he knew plaintiff's corn was damaged and, in fact, No. 5 corn.

Upon careful consideration of all the evidence, we are unable to say the trial court erred in refusing to set aside the verdict as being contrary to the manifest weight of the evidence.

We are of the further opinion the trial court properly refused to instruct the jury with reference to the application of the law governing implied warranty to the facts before them. There is no evidence in the record to which such instructions might relate. Plaintiff's theory of the case was that defendant purchased the corn in the crib at a certain price regardless of its condition or character. The trial court was not required to instruct the jury upon any proposition of law unless the same was applicable to the facts appearing in the evidence.

Finding no error in the record, the judgment of the Circuit Court of Edgar County will be affirmed.

Affirmed.

General No. 10760 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October May Term, A. D. 1954

ANNA EINFELDT, MATTIE CHRISTIAN, HERBERT O. HANNA AND JOSA HANNA, Plaintiff-Appellants, vs. JAMES WATKINS, Defendant-Appellee.	Appeal from Circuit Court of Kankakee County.

Dove, J.

Anna Einfeldt, Mattie Christian, Herbert O. Hanna and Josa Hanna filed their complaint in the Circuit Court of Kankakee County against James Watkins and Ora Watkins, who are husband and wife, charging them with negligence in the operation of their truck. The specific negligence charged against the defendants was driving at an excessive speed, attempting a left turn without warning, failure to yield the right of way at an intersection and failure to keep their truck on the right side of the roadway. The defendants answered the complaint and denied the allegations of negligence charged against them. The cause was tried before a jury, which returned a verdict finding the defendant, James Watkins, not guilty. The defendant, Ora Watkins, was dismissed out of the case prior to submission of the cause to the jury. Plaintiffs made the customary motion for a new trial, which was over-ruled, and the court thereupon entered judgment in favor of the defendant on the verdict of the jury. It is from this judgment that the plaintiffs appeal.

The collision out of which this controversy arises occurred on December 7, 1951, about fifteen minutes after midnight, near the intersection of Schuyler Avenue and River Street, in Kankakee, Illinois. Plaintiffs were returning from a club meeting at the home of a friend of theirs and plaintiff, Josa Hanna, was driving the small Willys automobile in which they were riding in a westerly direction on River Street at a speed of about twenty miles per hour. Defendants, residents of East Chicago, Indiana, were operating their Chevrolet truck, which was loaded with about five tons of coal, east on River Street. The truck and the car collided very near the intersection above mentioned. The automobile in which the plaintiffs were riding was completely demolished, and minor damage was inflicted upon the left front fender, bumper and wheel of the truck. The principal question is which vehicle was being driven in the wrong traffic lane. The testimony of the plaintiffs' witnesses tended to place the truck over the line and in that portion of the roadway belonging to plaintiffs' car, while the defendant and his wife testified that the plaintiffs' car was driven across the center line and into that portion of the street where their truck was rightfully being operated.

The basis of the plaintiffs' appeal is that the verdict is contrary to the manifest weight of the evidence, that the court erred in giving certain instructions on behalf of the defendant, and that the court also erred in giving the form of verdict which was tendered by the defendant. We will discuss the alleged erroneous instructions first.

Instruction Number Two given on behalf of the defendant was as follows: "The Court instructs the jury that it is not every accident which makes the driver of an automobile involved in it liable for damages for personal injury. If the accident is unavoidable so far as a driver is concerned, then no liability

is incurred by him whether as a result of the accident a person is slightly or seriously injured, and if in this case from all the evidence and under the instructions of the court the jury believe, that the defendant, James Watkins, was in the exercise of due care immediately before and at the time of the accident and so far as he was concerned the injury to the plaintiffs was unavoidable, then the jury should find the defendant not guilty."

Plaintiffs assert that since there was evidence of negligence by the defendant, although disputed by him, an instruction that defendant is not liable if plaintiff's injury "was a result of a mere accident occurring without negligence on the part of the defendant" only serves to confuse and mislead the jury.

The evidence in this case clearly shows that the collision between the defendant's truck and the car in which the plaintiffs were riding occurred because either the truck or the automobile was being driven in the wrong traffic lane. The truck was being driven ~~west~~ last by the defendant James Watkins, and the automobile was being driven ~~east~~ west by the plaintiff, Josa Hanna. One ~~or the other~~ of them got over in the other vehicle's proper lane of traffic, with the result that the two vehicles collided while going in opposite directions. There is no evidence in the record whatever of this being "a pure accident" within the meaning of that term. An unavoidable accident is necessarily one occurring not because of negligence. (Flanagan vs. Chicago City Ry. Co., 243 Ill. 456, 460; Carson, Pirie, Scott vs. Chicago City Ry. Co., 309 Ill. 346, 352.) In Streeter vs. Humrichouse, 357 Ill. 234, 244, an instruction was given which told the jury that if the death of the decedent was caused through "accident purely" they should find the defendant not guilty. The court in that case said that since there was no evidence that the

decedent was injured through accident, alone, not coupled with negligence, it was error to give such an instruction. In Crutchfield vs. Meyer, 414 Ill. 210, 213, an instruction was given which told the jury that if it believed the accident was one which occurred without negligence on the part of the defendants before or at the time the occurrance complained of, then the jury should return a verdict of not guilty. The court said this instruction was objectionable as the question of pure accident comes merely from suggestion and not from the evidence. In Kovacs vs. Richardson, 306 Ill. App. 194, 198, the defendants contended the court erred in refusing to give the following instruction requested by them: "If you believe from the evidence that the injury to the plaintiff, if she was injured, was the result of a mere accident which occurred without negligence on the part of the defendants, as charged in the complaint or in some count thereof, then the defendants are not liable in this case." In discussing this instruction, the court in that case said: "Under the facts of the instant case, this instruction could only confuse and mislead the jury. That was it's plain purpose. In the case of Streeter vs. Humrichouse, 357 Ill. 234, Mr. Justice Farthing hit the nail on the head when he held that an instruction like the one in question should not be given in a case unless there was evidence that a plaintiff was injured through accident, alone. In the instant case, if the accident to plaintiff occurred through the negligence of defendants, or through the negligence of plaintiff, or through the negligence of plaintiffs and defendants, the injuries to plaintiff could not be caused by 'a mere accident.'"

We recognize that defendant's instruction Number Two is not a pure accident in truction in the technical sense. However, since substantial evidence was introduced before the jury

which tended to show that the accident was the result of the defendant's negligence, and no evidence that the accident was unavoidable on his part, the giving of this instruction could only mislead and confuse the jury. We hold that under the testimony in this record that it was error to give this instruction.

Another instruction given by the defendant and complained of by the plaintiffs was instruction Number Four which was in this language: "The Court instructs the jury that under the law the mere fact that the plaintiffs, Anna Einfeldt and Mattie Christian, were guests or passengers in the automobile in which they were riding at the time of the collision in question does not excuse them from the duty of exercising due care and caution for their own safety, and if they were in a position in the automobile where they could, by the exercise of reasonable care on their part, have been that a collision was imminent, it was their duty, under the law, to warn the driver of the automobile, Josa Hanna, in time for her to have avoided the same, if possible." The vice of this instruction is that it assumes the plaintiffs did not exercise due care and caution for their own safety under the circumstances present before and at the time of the collision. In Lasko vs. Meier. 327 Ill. App. 5, at Page 10, in speaking of a similar instruction, the court said: "We do not consider it to be thelaw that in every case a guest or passenger is guilty of contributory negligence merely because he says or does nothing at the time of or immediately before an accident. We believe in many cases a jury could well believe that the highest degree of caution in a particular case may consist of inaction on the part of a guest or passenger. Of course a correct decision in any case depends largely upon the particular facts in such case. There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of

danger. In a variety of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with whataman of ordinary prudence would do under like circumstances. (Stack vs. East St. Louis & Suburban R. Co., 245 Ill. 308.) Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts do not establish due care and caution on the part of the person charged therewith (Thomas vs. Buchanan, 357 Ill. 270, 277) and the question of contributory negligence is ordinarily a question of fact for a jury to decide under proper instructions. (Smith vs. Courtney, 281 Ill. App. 530.)" See also Gillan vs. Chicago N. S. & M. Ry. Co.1 Ill. App. 2d, 466, 472, - 473.

In Bliss vs. Knapp, 331 Ill. App. 45, 51, the defendant contended that the court erred in refusing to give an instruction which informed the jury that if a passenger has an opportunity to learn of danger and avoid it, it is his duty to warn the driver of such danger. The court in that case said that the refused instruction was an incomplete, and hence an inaccurate statement of the law, inasmuch as it omitted the essential elements of whether or not plaintiff saw the defendant's car before the driver did, whether he could have given warning, and whether the warning, if given, would have averted the accident. In the instant case the testimony shows that this collision occurred very suddenly. There is no evidence which tends to show that the passengers in the car had an opportunity to see something which the driver did not see, or an opportunity to warn the driver if they did see something which the driver did not see. It is our opinion that this instruction was inaccurate and incomplete under the evidence found in this record, and should have been refused.

We have examined the two other instructions complained of and have read the cases cited in the briefs relating to them but don't believe it was reversible error to give them.

It is finally urged that the court erred in submitting on behalf of the defendant a single form of verdict, which was as follows: "The court instructs you that if you find the issues for the defendant, James Watkins, you should sign and return the following verdict: 'We, the jury, find the defendant, James Watkins, not guilty.'"

Verdicts should be responsive to the issues made by the pleadings. The instant complaint consisted of four counts, one count on behalf of each plaintiff: the principles of law applicable to the count which set forth Josa Hanna's cause of action were not the same principles applicable to the other counts which set forth the cause of action of the other plaintiffs, and, in our opinion, verdicts finding the defendant guilty or not guilty as to each count should have been submitted by the court and a finding should have been made by the jury as to each count. As the judgment must be reversed, the court will, upon a retrial of the case, submit to the jury appropriate forms of verdicts as indicated. Whether or not the verdict of the jury finding the defendant not guilty is contrary to the weight of the evidence, we express no opinion as the issues must be submitted to another jury.

The judgment of the Circuit Court of Kankakee County is reversed and the cause remanded for a new trial.

Reversed and remanded.

Wolfe P. J. Concurs,
Crow J. Tarkington J.

Gen. No. 10903 I.A. 2d 205 Agenda No. 1.0.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

OCTOBER TERM, A. D. 1954.

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. STORYL E. OLSON, Plaintiff in Error.	Error to County Court of Whiteside County.

MR. JUSTICE .

On April 6, 1953, the State's Attorney of Whiteside County filed in the County Court of that County, an information charging that Storyl Olson had violated the Illinois Statutes by not having his liquor license, issued to him by the Illinois Liquor Control Commission, framed and hung in plain view in a conspicuous place on the licensed premises. Olson was arrested and gave bond for his appearance in Court and entered a plea of not guilty. Later a hearing was had, and the defendant was found guilty and assessed a fine of fifty dollars and costs. The defendant entered a motion in arrest of judgment, which was denied and from this judgment the defendant has prosecuted a writ

of error to this Court. The State's Attorney has not seen fit to file a brief in this case and apparently has lost interest in it. It throws an extra burden upon this Court in deciding the issues presented to us.

Paragraph 139 Subsection 13 of Chapter 43 of the Illinois Revised Statutes entitled "Dram Shop," provides as follows: "Every licensee shall cause his license or licenses to be framed and hung in plain view in a conspicuous place on the licensed premises." The facts in this case are undisputed. The license was pasted inside a display case by having scotch tape pasted across the four corners of the license. The trial court found that the Statute had been complied with, so far as being in a conspicuous place was concerned, but found that the license was not framed, as required by the Statute. Webster's Dictionary describes frame, "as a kind of open case or structure made for admitting, enclosing or supporting things, as that which encloses or contains a window, door, picture, etc. An enclosing border, especially an ornamental one," and Webster's Dictionary defines "hanging" as follows: "(1) to be suspended or fastened to some elevated point without support from below; to dangle; to float; to rest; to remain; to stay. (2) To be fastened in such a manner as to allow a free motion from the point or points of suspension." Our attention has not been called to any legal definition of what framed or hung may be, nor have we been able to find one, so that we will accept Webster's definition as being the proper ones. Under this definition, technically, the license in question was not

framed, or hung.

It is insisted by the plaintiff in error that the way he had displayed his license was a substantial compliance with the Statute and that furthermore the Statute requiring the license to be framed was merely directory, and not mandatory. It will be observed that the section of the Dram Shop Act in question is a separate and distinct section, and it seems to us that it was mandatory that the license in question should be framed. The license itself was his authority to do business and he could not do any business without it, and the legislature in telling how the liquor business should be conducted, has declared that that license should be framed and hung in a conspicuous place so that not only the officers, but the public generally could see that they were dealing with a licensed operator, who was doing a legitimate business. It is our conclusion that the trial court properly found that the defendant was guilty, and the judgment should be affirmed.

Affirmed.

178 A

6 I.A.2d 206

46497

ESTHER BERGMAN, Appellee, v. GEOFFREY GILBERT, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is from an order granting plaintiff a new trial in an action for personal injuries, resulting from a collision of plaintiff's and defendant's automobiles. There was a verdict of not guilty. The trial court filed a written memorandum of the reasons for granting the new trial. It stated that the case was reasonably close, and the jury should have been correctly instructed.

It appears from the record that instructions Nos. 16 and 18 submitted by defendant, and given to the jury, were duplicates. Instruction No. 16 read:

> "You are instructed that the plaintiff is required by law to prove her case by a preponderance of the evidence before she can recover. If the plaintiff in this suit has not so proved her case, or if the evidence is evenly balanced, so that you are unable to say on which side is the preponderance, then, under any of such circumstances, the verdict should be not guilty."

Instruction No. 18 appears in the record as follows:

> "You are instructed that the plaintiff is required by law to prove ~~his~~ her case by a preponderance of the evidence before she can recover. If the plaintiff in this suit has not so proved ~~his~~ her case, or if the evidence is evenly balanced, so that you are unable to say on which side is the preponderance, then under any of such circumstances, the verdict ~~should~~ may be not guilty."

These were peremptory instructions. The interlineation in the handwriting of the trial judge in instruction No. 18 likely attracted special attention of the jury to it, and gave undue emphasis to the jury as to the burden of proof resting upon plaintiff.

Another reason appearing in the memorandum of the trial judge related to instruction No. 14 given for defendant. That instruction stated to the jury:

> "On the date of the accident and damage complained of by the plaintiff in this case, there was in full force and effect a certain statute * * *."

We also find instruction No. 19, which had reference to damages, stated that plaintiff had the burden of proving that such ailments and disabilities "are the result of the accident in question," and that they have no right to guess or conjecture that any ailment complained of by the plaintiff "is the result of this accident."

The trial court concluded that the use of the word "accident" could lead the jury to believe that the injuries resulted from a mere accident, and not the alleged negligence on the part of defendant; and that the evidence afforded no basis for any inference of an accident. We think upon the evidence the only conclusion to be reached was either that the parties were or were not guilty of negligence.

Defendant contends that the word "accident" is not a technical term with a clearly defined meaning, but ordinarily should be regarded as referring to the occurrence or mishap and not a mere accident, as considered by the trial judge.

We find in connection with the latter contention that instruction No. 10 given for defendant reads as follows:

> "It was the duty of the plaintiff and of her husband who was driving to use reasonable care to avoid injury to the plaintiff. If you find from the evidence, and under the instructions of the Court, that the plaintiff and her husband failed to use such care just before and at the time of the occurrence in question, and if you also find that such failure, if any, proximately contributed to cause such occurrence, then the plaintiff was guilty of contributory negligence and cannot recover from the defendant, whether or not the defendant was guilty of negligence."

It will be observed that the latter instruction made reference to the "occurrence" and did not embody the word "accident." It could well be that the jury was led to believe that the court meant to make a distinction between "occurrence" and "accident."

A trial court is allowed greater latitude in granting a new trial than in denying one. Callos v. Public Taxi Service, Inc., 292 Ill. App. 399, and cases there cited.

We do not think upon this record that the trial court abused its discretion in considering the case a reasonably close one upon the evidence, and requiring that the jury be correctly instructed.

The order appealed from is affirmed.

AFFIRMED.

LEWE, J. CONCURS.

KILEY, P.J., TOOK NO PART.

179A

6 I.A.2d 207

46549

HOWARD SIDDONS, Appellee, v. SAM COVICH, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in the sum of $4,000 entered on the verdict of a jury in an action to recover damages for personal injuries. Defendant's motions for a new trial and judgment notwithstanding the verdict were denied.

About 3 o'clock p.m. on March 12, 1949, plaintiff, a truck driver, delivered a kitchen unit to the residence of defendant in the Village of Oak Park, Illinois. This unit, consisting of a sink, stove and cabinet, weighed about 300 pounds. It was six feet tall, three and a half feet long and two feet wide. The defendant's residence faces north and along the west wall there are two unguarded window wells. The window well at the northwest corner of the building is four feet deep and extends from the west wall about two and a half feet and is encased in cement. The other window well is located near the south end of the building. About midway between the window wells there is a chimney stack projecting about two feet from the west building wall. Adjacent to the window wells there is a flagstone walk which starts at the chimney stack and runs to the south end of the building. Bordering the west side of the flagstone walk there is a line of shrubbery.

After removing the kitchen unit from the truck at the street curb plaintiff and one Louderback, a fellow employee, proceeded to carry the unit across the lawn in the front of the building toward the rear in the following manner. Plaintiff and Louderback each grasped an end of the unit, plaintiff walking backward while facing Louderback. Louderback was holding his end of the unit higher than the end held by plaintiff, causing it to tilt toward the plaintiff. Holding the unit in this position obstructed plaintiff's forward and backward view. When plaintiff reached the northwest corner of the building he fell into the unguarded window well, causing the injuries here complained of.

Defendant contends that plaintiff failed to prove that the defendant was guilty of negligence. There is evidence that: While the kitchen unit was resting at the street curb Louderback inquired of defendant, "if we could go through the front of the building." Defendant refused permission and directed that the unit be carried around the west side of the building. Louderback then inquired, "if it was safe," to go around the west side of the building, whereupon defendant responded that it was. Neither plaintiff nor Louderback knew of the existence of the open window well at the northwest corner of the building, nor did the defendant inform them thereof.

As plaintiff was walking backward carrying the unit along the path defendant had directed, defendant was standing nearby on the sidewalk but gave plaintiff no warning of the open window well.

Plaintiff and Louderback relied upon defendant's assurance that the route he had designated was safe. The evidence also shows that at the time of the occurrence plaintiff and Louderback were carrying the kitchen unit in the usual and customary manner.

The law is well established that if a person is upon the premises of the owner by an invitation, express or implied, and not by mere permission, then such owner owes him a duty to exercise ordinary care to keep the premises in a reasonably safe condition. (Milauskis v. Terminal R. R. Co., 286 Ill. 547; Pauckner v. Wakem, 231 Ill. 276.) Under the circumstances shown by the evidence, the question whether the defendant was negligent was one of fact for the jury to determine. (Thomas v. Douglas, 1 Ill. App. 2d 261.) Likewise, the question whether the plaintiff was in the exercise of due care at the time of the occurrence presented an issue of fact which was resolved by the jury in favor of the plaintiff.

There was testimony that window wells such as the one here involved are usually covered with grates. Defendant objected to plaintiff's Exhibit 7 which shows a window well covered with a grate. After this exhibit was received in evidence, defendant's counsel, outside of the presence of the jury, made a motion to withdraw the exhibit. He also stated to the court that "I want the court to tell them that counsel was in on a motion and asked to withdraw it [Exhibit 7] and the court should instruct the jury that they shall disregard it and pay no attention to anything that was said."

In accordance with defendant's motion the trial judge instructed the jury "to pay no attention to the introduction of this picture [Exhibit 7] or any remarks that were made in connection therewith." The jury did not see Exhibit 7 before or after it was withdrawn. Since the jury were instructed to disregard the exhibit, which they never saw, or any reference to it, we do not think that the defendant was prejudiced.

In our view the evidence is ample to support the verdict.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

FEINBERG, J., CONCURS.

KILEY, P.J., TOOK NO PART.

180 A

6 I.4[2d] 207

46616

HENRY KAUFMAN, Appellant, v. MELVIN GOLDMAN, GEORGE KAUFMAN, IDA KAUFMAN and CONRAD KAUFMAN, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing his complaint to recover damages resulting from defendants' alleged violation of Section 45 of the Business Corporation Act of Illinois and for the issuance of a writ of mandamus.

The complaint consists of four counts. Counts 1, 2 and 3 allege in substance that plaintiff is the owner of 47-1/2 per cent of the capital stock of Associated Heating Supplies, Inc., an Illinois corporation, hereinafter called "the corporation"; that the defendant Melvin Goldman is attorney for the corporation and the other defendants are officers of the corporation; that plaintiff demanded orally and in writing, on specified dates, of defendants that plaintiff be allowed to examine certain corporate records, minutes of meetings, records of account, records of shareholders' certificate stubs showing stock issued, and other information with respect to corporate transactions, and that the defendants and each of them refused to make available and to produce these records and the information sought by plaintiff. In these counts plaintiff asked for damages in accordance with the provisions of Section 45 of the Business Corporation Act

(Illinois Rev. Stat., State Bar Edition, Chapter 32, Section 157.45). Count 4 asks that a writ of mandamus issue directing defendants and each of them to make available and exhibit to plaintiff the books and records of the corporation at its regular place of business.

Defendants filed a sworn answer on June 11, 1954, averring that ever since 1947 all the books and records have been available and open to plaintiff, his agents and attorneys and are so at the present time; that plaintiff is furnished with a desk at the corporation's office where he and his wife and Certified Public Accountants employed by him have examined and audited the corporation's books at various times and for extended periods down to and including the present time; that defendant Goldman has in his office certain books and records of the corporation which constitute but a small portion of the corporation's books and records and relate solely to matters at issue in a similar suit instituted by plaintiff against the same defendants pending in the Superior Court of Cook County, Docket Number 50-S-3698.

July 2, 1954 plaintiff filed a motion to strike defendants' answer. August 2, 1954 plaintiff appeared in court and sought to withdraw his motion to strike the answer and for leave to file a reply instanter. September 16, 1954 plaintiff next presented his motion for leave to file a reply. On that day the trial court denied plaintiff's motion for leave to file a reply and also overruled plaintiff's motion to strike the answer. September 23, 1954 plaintiff on his own motion dismissed Count 4 of his complaint, and on September

27th, on defendants' motion, the order here appealed from, dismissing the remainder of the complaint consisting of Counts 1, 2 and 3, was entered.

Plaintiff's principal contention is that the trial court erred in denying plaintiff leave to file his reply on September 16, 1954.

Section 4 of the Mandamus Act (Chapter 87, Illinois Revised Statutes, State Bar Association Edition) reads: "The petitioner may reply to the answer, or present a motion directed against the same within five days after the last day allowed for the filing of the answer and further pleadings may be had as in other cases." According to the record the last day for filing of the defendants' answer was June 13, 1954. Under the provisions of the foregoing Section 4 plaintiff's reply or motion to strike the defendants' answer was due June 18th. Plaintiff's motion to strike defendants' answer was not filed until July 2nd. No showing was made by plaintiff justifying this delay. Nor does the purported reply of the plaintiff appear in this record. We are, therefore, unable to determine whether the proffered reply was sufficient to form an issue of law or fact. Under these circumstances we cannot say that the trial court erred in denying plaintiff leave to file his reply. In support of his position plaintiff relies on Kelly v. Kelly, 285 Ill. 72, involving a will contest. The pleadings in that case were governed by the Chancery Act which was adopted in 1916 and repealed in 1933. With respect to the pleadings in the present case, Section 4 of the Mandamus Act adopted in 1935 is applicable.

Allegations of fact in defendants' sworn answer in avoidance of the charges in the complaint which are not denied are admitted. See People ex rel. Iasello v. McKinlay, 409 Ill. 120. Assuming, as we must, in the absence of a reply, that the affirmative allegations of the defendants' answer are true, it follows that the order dismissing the complaint was proper. In the view which we take of this case it is unnecessary to consider the other points raised.

For the reasons given, the order dismissing the complaint is affirmed.

ORDER APPEALED FROM AFFIRMED.

FEINBERG, J. CONCURS.

KILEY, P.J., TOOK NO PART.

2007

6 I.A.2d 203

46595

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
SYLVESTER HODRICK, Appellant.	)	OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The People brought suit in the criminal branch of the Municipal Court of Chicago upon information filed by Pauline Hocks against Sylvester Hodrick charging that on April 29, 1954 he unlawfully, knowingly and wilfully encouraged her, a female under the age of eighteen years, to become a delinquent child by committing certain acts as set out in the information. Trial by jury having been waived, the court found defendant guilty and sentenced him to the county jail. In the absence of a bill of exceptions or statement of facts properly certified to by the judge and incorporated in the record, the weight and sufficiency of the evidence to convict cannot be considered, since no motion for a new trial was interposed before judgment. The case came up for hearing on July 7, 1954. Seven days later, and after judgment had been entered against defendant, he filed a petition asking that the finding of guilty be vacated, that the return of commitment be quashed, and that he be given a rehearing. On August 11, 1954 the court entered an order denying the petition for rehearing and providing that the case "be postponed and set for trial December 8, 1954." Thereafter defendant filed his common law record on appeal.

Since the cause was postponed and set for trial on December 8, 1954, there is no final appealable order; accordingly, the appeal is dismissed.

APPEAL DISMISSED.

BURKE, P. J., AND NIEMEYER, J., CONCUR.

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16 I.A.2d 203

46596

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. SYLVESTER HODRICK, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This cause, based on an information filed by Lorraine Williams, presents substantially the same facts and legal questions as those outlined in cause No. 46595, in which an opinion is being concurrently filed this day.

The two causes were here consolidated, and what we have said in opinion No. 46595 is equally applicable to this proceeding. This appeal is likewise dismissed.

APPEAL DISMISSED.

BURKE, P. J., AND NIEMEYER, J., CONCUR.

Case 201 People of State of Illinois, Appellee, v. Sylvester Hodrick, Appellant.

Gen. No. 46,596. (Abstract of decision.)

First District, First Division.

May 13, 1955.

This case is controlled by the decision in People v. Hodrick, ante, p. 595.

Appeal from the Municipal Court of Chicago; the Hon. VICTOR A. ULA, Judge, presiding. Appeal dismissed. Ransom & Ransom, for ppellant; Robert E. Ransom, of counsel; John Gutknecht, State's ttorney of Cook county, for appellee; John F. Gallagher, and Rudolph L. anega, Assistant State's Attorneys, of counsel. Opinion by JUSTICE RIEND. Not to be published in full.

(Case No.)

Error to the Municipal Court of Chicago;
Superior Court of Cook County;
Appeal from the Circuit Court of county;
County Court of county;
City Court of

the Hon. , Judge, presiding.

Affirmed
Reversed
Reversed and remanded with directions.
Heard in the division, first district, this court at the term .

for appellants;

for plaintiffs in error;

for appellees;

for defendants in error.

Opinion by Presiding Justice .

Not to be published in full. Opinion filed ; rehearing denied ; released for publication .

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General No. 10793 — Abstract — Agenda No. 9

16 I.A.2d 209

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

APRIL TERM, A. D. 1955

[illegible], as Administrator of the Estate of ELLIS J. [illegible], deceased, Plaintiff-Appellant, vs. The Illinois [illegible] Company, an Illinois Corporation and [illegible], Defendants-Appellees	Appeal from the Circuit Court of [illegible] County.

CROW, J.

This is an appeal by the plaintiff from a not guilty verdict of a jury and a judgment entered thereon in favor of the defendants. The action was for damages by the plaintiff, as administrator of the estate of Ellis J. Linquist, deceased, for the death of the plaintiff's intestate alleged to have been caused as the result of injuries received when she was struck by a locomotive owned and operated by the defendant, The Illinois Central Railroad Company. The operator of the train, George Harzel, was also made a party defendant. The complaint, as finally amended, contained two counts, - count one for certain specified alleged acts of negligence of both defendants, and count two for certain alleged wilful and wanton conduct of both defendants. The defendants answered the same. After the verdict for the defendants, the plaintiff's motions for judgment notwithstanding the verdict, and for new trial, were overruled.

A brief review of the evidence indicates that on April 15, 1952 at about 3:00 p.m., a bright, sunny day, the decedent, Elin M. Linquist, a lady 64 years old, was walking in a westerly direction along the north sidewalk adjacent to Broadway Avenue, an east-west street in the City of Rockford, and was approaching the tracks of the railroad company, which, at that point, intersected Broadway; there was no indication as to where she had been, or was going, or whether she looked, or not, as she approach the railroad right of way; a light wind was blowing from the northeast to the southwest; the railroad tracks at the intersection run generally in a northerly and southerly direction; the crossing is in a business and residential area. At a point about one mile south of the intersection, there is a curve of the tracks, going to the right as one looks south from the intersection, or, that is, the tracks at that point extend in a southwesterly direction, and after arriving at Broadway at the intersection the curve in the tracks continues and is then on the left hand side as one looks to the north from the intersection, that is, north of the intersection the tracks extend in a generally northwesterly direction, and the grade is somewhat downhill. Vehicular and pedestrian traffic is generally heavy at the crossing, and the train movements there are generally extensive. A pedestrian on the north sidewalk at the intersection, if looking, evidently has an unobstructed view down the tracks to the south for some 1200 feet or so.

The east track at the intersection is the so-called passing track and the west track is the so-called main line. The freight train of the defendant railroad company was composed of some 63 cars, some 39 loaded and the rest empty. It

was proceeding in a generally northerly direction on the west or main line track through Rockford to Freeport. It was an extra freight train operated by train orders as distinguished from a train operated by a time table. The crew was composed of the engineer, fireman, head brakeman, brakeman, conductor, and rear flagman. George Herzel, the additional party defendant, was the fireman, but at the time he was running the engine as an engineer, having changed over with the engineer prior to the incident here. He was also a licensed engineer. At the crosswalk of Broadway with the railroad tracks, the outer rail of the west or main line track is some 19 to 20 feet west of the inner rail of the east or passing track. In order for there to be clearance of any objects to the east side of the west main line track a person had to be 4 to 4½ feet back from the east rail thereof to clear any part of the northbound freight train due to the overhang of the engine and cars. The train came to a stop some 22 car lengths, about, beyond the intersection after the incident here involved. The average car length is about 40 feet. The point of the occurrence is within the yard limits of the railroad.

The conductor, Joe Swoboda, testified for the defendants that it was the duty of the fireman, or the person in the position of the fireman, who sat on the left side of the engine, to watch the curves, and to keep a sharp lookout at all times for objects on the right-of-way. He, the fireman, gets the first view of the crossing at Broadway, approaching it from the south, when approximately a quarter of a mile away, and the view he so obtains continues up to about 50 to 75 feet south of the crossing, where it tapers down due to the length of the engine. From the engineer's side, on the right of the engine, the first view obtained is at a point about 25 to 30 car

lengths, - about 150 feet, - South of Broadway, and then the engineer can see the crossing gates only, and this view is evidently for only a short distance, - about 20 feet. Prior to that time, the engineer, or the person in the position of the engineer, cannot see the crossing because of the curve. The fireman can see the crossing but the engineer cannot. There is one gate at this crossing for each side, east and west, for auto traffic. He heard no whistle when the train approached the crossing. The conductor said the train was going 25 miles per hour. At the time, he was in the caboose at the end of the train.

Louis Duggin, for the defendants, testified that he was the signal maintenance man on April 15, 1952 and that the following signals, warning signs, bells and lights were present at the time of the accident: at the northeast quadrant of Broadway at the intersection there is a gate and on the gate there are three lights; the gate extends over part of the street but not over the north sidewalk; it is about 28 feet east of the east rail of the east or passing track; there is a stop light with 4 red lights and a bell; the gate is painted black and white with stripes; there is a cross arm signal painted white with illuminated numbers on it; there is also a cross buck on the east side of the right-of-way at the crossing in the northeast quadrant; the signals are automatically set in operation 3,000 feet before a train reaches the crossing; all the signals, the automatic equipment, the lights, and the bell operate at the same time; the gates come down about 4 seconds after the lights and bell begin to operate; the signals had been tested the morning of the day of the occurrence, were tested shortly after the occurrence, and were all operating properly.

There is another gate at the southwest quadrant of the intersection which extends over the south part of the street. Percy Kessling, Mr. Luggin's assistant, testified to substantially the same effect.

The brakeman, Thomas Fogle, testified that he was seated right behind Webber who was acting as fireman at the time. Though looking out the left side, the brakeman did not see the plaintiff's intestate at any time before the impact. Right before the crossing of the intersection by the train the emergency brakes were applied by the engineer and the engineer asked if the lady got across. There was no speedometer on the train. He said its speed was 20 to 25 miles per hour. He said the bell was ringing on the engine and the whistle was blown.

The witness Charles C. Webber, the regular engineer, whowas acting as the fireman at the time, testified that he was seated on the left hand side of the cab firing the engine; Fogle, the brakeman, was immediately behind him. As the train approached the crossing, he Webber, though generally looking forward, was operating the stoker and keeping the smoke down; when he did look out of the cab approaching Broadway he could see an auto standing at the crossing and the gates were down. He saw Harzel, who was acting as the engineer at the time, blow the whistle two longs, one short, and one long, the regular crossing whistle, as they came up to the crossing, and he says Harzel started to blow it before the whistle point. The engine bell was in automatic operation a mile and a quarter away from the Broadway crossing. They were going not to exceed 25 miles per hour. He did not see the women involved in this incident at any time before the collision. From the time the engine first got into the curve and from the first time he had a view

of the Broadway crossing and up to the time of the incident he did not take his eyes off of the right-of-way of the main line. He had a complete view of the crossing about 60 car lengths south of the crossing but when 60 car lengths away he was engaged in adjusting the steam and amount of smoke the engine was emitting. When Harzel, the then acting engineer, applied the emergency brakes he said: "Did the woman get across?"

There is only one witness, Mrs. Carl Johnson, for the plaintiff, claiming to be an eye witness to this occurrence and she claimed to have seen the train and the woman involved in the incident. She was in her residence some 100 to 150 feet southwest of the intersection of the tracks and Broadway, and, while talking on the phone, was looking through a kitchen window. She testified that when she first saw the woman, the woman was walking slowly on the north crosswalk going west at a point west of and beyond the gate located on the east side of the tracks. The east gate was then going down and the woman was walking with her head down, apparently did not slip or stumble, and appeared close to the track as the train went by. This witness heard the whistle for the first time as the train reached the intersection and then observed the woman turn and look at the train, take one or two steps forward, and then more or less freeze in her tracks. At the time the engine crossed the intersection this witness lost sight of the decedent and did not see the engine or any part of the train strike the decedent. The witness testified, from such observation as she had, that the train was going 30 to 35 miles per hour. She says she heard no bell sounded, and when the train came to a stop no bell was ringing then.

At the close of all the evidence the plaintiff moved to amend the amended complaint in certain respects, which was denied, and the Court also denied the motions of the defendant for a directed verdict, at the close of the plaintiff's evidence and at the close of all the evidence.

This case was heard on the two counts in the complaint, as amended, Count 1 alleging certain acts of negligence as set forth in paragraph 5 thereof, and Count 2 alleging certain wilful and wanton acts as set forth in paragraph 6 thereof. It would appear that the Court at the close of the Plaintiff's evidence struck all of the alleged negligent acts charged in paragraph 5 of Count 1, except subparagraph "a" with reference to speed, subparagraph "d" with reference to the maintenance of the right-of-way, and subparagraph "f" with reference to the ringing of a bell or blowing of a whistle on the engine, and as to Count 2 the court struck all of the charges of wilful and wanton conduct in paragraph 6 except subparagraph "b" relating to keeping a proper and sufficient lookout, subparagraph "g" relating to maintenance of the right of way, and subparagraph "i" relating to a general charge of wilful and wanton operation of the train.

The defendants have moved to dismiss the appeal, or, alternatively, to strike and expunge certain parts of the plaintiff's brief and argument upon the grounds that the appeal is frivolous and not filed in good faith, and the plaintiff's brief and argument violates Rule 7 (Briefs) of this Court, as being too long (79 pages), repetitious, the statement of facts contains argument or comment, the points and authorities, with the various subdivisions thereof, are not clear, and are too numerous (6 main points, and a total of 8 subdivisions, taking

about 8 pages in the brief), the citations of authorities (about 115) are beyond reason in number, and it refers to some matters that are not in the record at all. We would be reluctant to say the appeal is frivolous and not filed in good faith. We believe, however, the plaintiff's brief and argument does not in some respects properly conform to Rule 7 (Briefs) and is reasonably subject to some criticism. But we are not on that account disposed to consider dismissing the appeal, even if we had authority so to do, which may be questionable. Nor, if we struck the plaintiff's brief and argument, or parts thereof, and permitted, or did not permit, a new plaintiff's brief to be filed, would that solve anything as a practical matter. We would still be required to pass upon the alleged errors, or some of them, so far as they appear in the record, which may require a reversal and a new trial. The rights of litigants, if they have any, ought not unnecessarily to suffer because the briefs of their attorneys indicate in some respects insufficient attention to Rule 7 and are not as helpful to the Court as briefs are supposed to be. Insofar as the unreasonably large number of citations in the plaintiff's brief and argument is concerned, the exigencies of a proper discharge of the business of the court will obviously make it impossible to consider them all, or any substantial number thereof, and insofar as the plaintiff's brief and argument may refer to matters that are not in the record, we will recognize that circumstance if and when it appears and shall, to that extent, ignore those portions of the brief and argument. The defendant's motion is, therefore, denied, but such is not to be considered as an approval of the methodology of the plaintiff's brief and argument.

We will, therefore, now take up one of the principal errors alleged, and that is certain allegedly erroneous instruc-

tions given at the request of the defendants, and the failure to give certain allegedly proper instructions offered by the plaintiff.

The plaintiff directs our attention to the plaintiff's offered instructions Nos. 5, 6, 9 and 10, refused by the Court. No. 5 reads as follows:

> "5. You are instructed that the plaintiff alleges in his complaint that the defendants wilfully and wantonly and with a conscious indifference to surrounding circumstances and with a reckless disregard for consequences and for the rights and safety of others, operated its train around a curve and across the crossing of its tracks with Broadway Avenue in Rockford, Illinois, at a speed that was greater than was reasonable and proper, having regard to the traffic and the use of the way and at a speed which endangered the life and limb of the persons lawfully present at the time and place contrary to the Amending Resolution of the Illinois Commerce Commission, dated December 6, 1933, and in failing to cause a bell or a steam whistle on said locomotive engine to be rung or whistled by the engineer or fireman, violation of Section 59 of Chapter 114 of the Illinois Revised Statutes, and that by reason thereof the train so operated by the defendants, the Illinois Central Railroad by and through its agent and the defendant, George Harzel (Helzel), was caused to come in violent contact with the person of the plaintiff's intestate, whereby she was killed.
>
> If you believe from a preponderance of all the evidence, under the instructions of the Court, that the plaintiff has proved that the defendants were guilty of wilful and wanton conduct, as set forth above, and as alleged in the amended complaint, and that such wilful and wanton conduct, if any, caused or proximately contributed to cause the accident, injury and death complained of in this case, and if you further believe from a preponderance of all the evidence under the instructions of the Court, that the plaintiff's intestate, Elin M. Linquist, left next of kin and that the next of kin and the deceased, at an immediately prior to the accident referred to above, were free from wilful and wanton conduct which caused or proximately contributed to cause her injury and death, then you should find the issues in favor of the plaintiff."

We believe that the plaintiff was entitled to have this instruction given, which appears to be substantially accurate, and which is based on his theory of the case under Count II, the wilful and wanton count, which count was permitted to go to

the jury, and, no other instruction having been given thereon, the failure to give the same was reversible error. A party is entitled to an instruction relative to his theory of the law, if accurate as to the law, which applies directly and specifically to his theory of the facts, if there be evidence tending to prove those facts, so that if the jury finds such facts from the evidence they may correctly apply the law thereto in reaching a decision: THOMAS v. CHICAGO [illegible] & CO. (1925) 307 Ill. 134; VIECELI v. CUNARD etc. et al. (1944) 322 Ill. App. 559. In a personal injury suit in which there is a wilful and wanton conduct count in the complaint and that count is still in the complaint when the cause is submitted to the jury, if there is any evidence tending to support that count, the plaintiff is entitled to have given an instruction on wilful and wanton conduct, if correct, and where no other instruction is given on that issue: MANTONYA v. WILBUR [illegible] CO. (1929) 251 Ill. App. 364.

Under the circumstances, it is not necessary to comment on the other plaintiff's offered instructions Nos. 6, 9, and 10, refused, and we express no opinion as to them.

The plaintiff further calls our attention to the following defendants' instructions given, - Nos. 3, 4, 12, 16, 21, 22, 29, 31, 32, and 33.

Of those defendants' instructions so given, Nos. 21, 29, and 31 read as follows:

> "21. If the jury believe from the evidence that immediately before the accident in question in this case, and while she was approaching the crossing in question, the plaintiff's deceased, by using her faculties with ordinary and reasonable care and caution in looking out for danger of an accident on this crossing, and could, and would have avoided an accident and injuries, which caused her death, and that she negligently or carelessly failed to do so, and thereby contributed to cause the accident and injuries, which caused her death, then the plaintiff cannot recover in this case and the verdict should be for the defendant company."

"29. The Court instructs the jury that a railway crossing at a public street is a place of known and apparent danger, and that it is the duty of a pedestrian, going towards and approaching and about to cross a railroad track at such road crossing, to approach such track with that degree of care that is ordinarily used by ordinarily careful pedestrians in so approaching such railroad crossing; and in this case if the jury believe from the evidence, the said deceased, by using such degree of care, could have seen or heard the approaching train or learned of its approach, and could have thereby avoided the collision, and that she failed in one or both of said respects, and in consequence thereof was struck and killed, then defendants were not liable, and you should not find a verdict for the plaintiff in any amount, but in such case you should find the defendants not guilty."

"31. The Court instructs the jury that the employees of the defendant in charge of the train in question were not required to exercise the highest degree of care to avoid injuring the deceased upon the occasion in question, but were only required to exercise such ordinary care as an ordinary, prudent and cautious person would exercise under like circumstances and surroundings; and if you believe from the evidence in this case, under the instructions of the Court, that as the train approached the crossing, it was being operated with such ordinary care and the engineer of the train in question, in the exercise of such ordinary care, did all he could to avoid the accident in question, as soon as it was apparent and ascertainable to him, in the exercise of ordinary care, that the deceased was getting into or near a position of danger, then the plaintiff cannot recover in this case."

It will be observed that those instructions, Nos. 21, 29 and 31, of the defendant so tendered and given, dealing with alleged contributory negligence of the decedent and alleged negligence of the defendants were not confined simply to Count 1 of the amended complaint, which charged various acts of ordinary negligence, and to which they may be properly applicable, but those instructions are general as to the whole complaint, including both Count 1 and Count 2, and are peremptory in character. The second count of the amended complaint alleged wilful and wanton conduct on the part of the defendants, which circumstance is ignored by instruction No. 31, and against which the decedent's lack of due care, or contributory negligence, if such were the case, referred to in instructions Nos. 21, and 29, would, of course, be

no defense. To sustain such charges of alleged wilful and wanton conduct of the defendants under that second count, the plaintiff was not bound to prove due care and freedom from contributory negligence on the part of the decedent. Those three instructions tendered by the defendants and so given, being not limited to the first count of the amended complaint, numbers 21 and 29 being inaccurate as applied to the second count, number 31 ignoring the second count, and the second count nevertheless having been permitted to go to the jury, these instructions, under the circumstances here, were erroneous.

Where the issue of wilful and wanton conduct goes to the jury an instruction which ignores that issue and tells the jury that contributory negligence of the plaintiff (under another count) is a complete defense is erroneous, and, although an instruction asked may be proper under a particular count, such as ordinary negligence, it should be refused if it is not confined as to another count, such as wilful and wanton conduct, and where its scope is not limited to the count as to which it is proper: [illegible] v. [illegible], supra; [illegible] v. [illegible], et al. (1939) 293 Ill. App. 542; [illegible] v. [illegible] (1938) 34[illegible] Ill. App. 580; [illegible] etc. v. [illegible] (1931) 262 Ill. App. 337.

The defendants' instruction No. 33 tendered and given is as follows:

> "33. The Court instructs the jury that if you believe from all of the evidence in this case that the death of Elin M. Linquist was caused by an accident, and that neither the defendants nor the decedent, Elin M. Linquist, and her next of kin, were guilty of any negligence, that then there can be no recovery in this case, as to the defendants, and the jury should so find by their verdict."

There is nothing in the record to indicate that the plaintiff's decedent died as the result of simply an accident, unavoidable in character, not coupled with negligence, or contributory negligence, or wilful and wanton conduct. So far as

this record indicates, the death of the decedent was the result either of negligence of the defendants, the decedent being free of contributory negligence, or was the result of wilful and wanton conduct of the defendants, or was the result of the decedent's contributory negligence, and the case appears to have been so tried by all parties. It is only where there is evidence tending to show that the plaintiff or his decedent was injured through an accident, unavoidable, alone, not coupled with anything else, that such an instruction would be appropriate, and the giving thereof should be discouraged: [illegible] v. JOHNSON (1954) 2 Ill. App. 2nd 315; [illegible] et al. v. [illegible] et al. (1943) 320 Ill. App. 618; [illegible] v. [illegible] (1946) 328 Ill. App. 648; [illegible] v. [illegible] (1951) 262 Ill. App. 417. We think, therefore, the giving of that defendants' instruction is, in the circumstances here, error.

Under the circumstances it is not necessary to comment on the other defendants' given instructions Nos. 3, 4, 12, 16, 22 and 32, of which the plaintiff complains, and we express no opinion as to them.

We believe that there was reversible error in giving those defendants' instructions Nos. 21, 29 and 31, without limiting their application to Count 1; in giving that defendants' instruction No. 33 on the record here presented; and in refusing to give the plaintiff's offered instruction No. 6 under Count 2, and that the error in these respects was not cured, or the plaintiff precluded from objecting thereto, by the finding by the jury under the special interrogatory submitted by the plaintiff that the defendants were not guilty of wilful and wanton conduct. That the plaintiff did not object to that finding of fact or in his motion for new trial urge as a grounds any objection to such

finding of fact does not prevent his complaining as to instructions or the law given or refused. The plaintiff is not complaining of the special interrogatory, as such, or the jury's finding thereon, as such. He is complaining, in part, as to instructions given or refused and we perceive no reason why he cannot do so.

A special interrogatory is simply an interrogatory submitted to the jury as to a material question or questions of fact: CH. 110 ILL. REV. STAT., 1953, par. 189. It is not an instruction as to the law. It necessarily assumes the jury has been or will be otherwise properly instructed as to the law. That special interrogatory and the jury's negative answer thereto would be of importance if, and upon the assumption that, there were no reversible error in the giving or refusal of instructions prior to the time the jury retired to consider their verdict and the special interrogatory, but there being reversible error as to such instructions we can, under the circumstances, attach no weight to the finding of the jury on the special interrogatory. We have read the only cases the defendant cites, - BRADY v. C. and A. RY. CO. (1920) 294 Ill. 606; JACOBS v. [illegible] CO. (1931) 262 Ill. App. 481; ERICSON v. [illegible] CO. (1913) 257 Ill. 11; VOIGT v. ALTON etc. CO. (1903) 202 Ill. 462; EMPIRE etc. CO. v. BEALY (1896) 164 Ill. 58; PEN. COAL CO. v. KELLY (1895) 156 Ill. 9; CITY OF AURORA v. MACDONALD (1894) 149 Ill. 399; AVERY v. MOORE (1890) 133 Ill. 74, - and we do not believe them in point on the question involved here or applicable to the case at bar. Typical of them is BRILE v. BELDEN MFG. CO., supra, in which, among other things, the Court held, in substance, that where a party submits a special interrogatory the jury's finding is no more binding on him than the

jury's general verdict, but if the party wis es to raise a question later about such finding of fact he must at least make a specific objection thereto in a motion for new trial and assign error thereon on an appeal, otherwise he is conclusively bound by the finding of fact, - such is not the point in the case at bar. None of those cases hold that such a party is precluded from objecting to instructions on the law or that a jury's finding on such a special interrogatory cures otherwise erroneous instructions or forecloses inquiry as to them.

~~The case here was reasonably close as to the inferences and conclusions to be drawn from the facts and we cannot say these errors may not have been prejudicial.~~

In the view we take of the matter, we do not consider it necessary to discuss any others of the numerous additional alleged errors claimed by the plaintiff and we express no opinion on those other matters. Our conclusion is that the plaintiff's motion for a new trial should have been allowed and that the judgment for the defendants must be, and is hereby, reversed and the cause remanded for a new trial.

[illegible] and REVERSED.

Dorr J Concurs
Wolfe P.J. took no part.

208 A

46566

6 I.A.2d 281

AXEL J. JOHNSON, doing business as AXEL J. JOHNSON & CO., Appellee, v. ABE SCHWARTZ and LILY SCHWARTZ, Appellants.	)	APPEAL FROM COUNTY COURT, COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

In a suit brought by the plaintiff against the defendant for a brokerage commission the trial court, on a trial without a jury, found for the plaintiff in the sum of $1,500 and entered judgment for that amount. From this judgment the defendant takes this appeal on the ground that the finding of the trial court is not supported by the evidence in that the plaintiff failed to prove that he was the procuring cause of the ultimate sale and that he also failed to prove a contract of employment.

From the record it appears that the evidence on the part of the plaintiff shows that the first contact between the defendant and the parties who finally purchased the property was made through the plaintiff; that the defendants listed the property in question with the plaintiff and at that time there was an agreement that the brokerage commission should be five per cent of the sales price; that immediately before the ultimate sale the plaintiff offered to the defendants a contract signed by the buyers in which the latter agreed to purchase the property for $30,000, which contract was re-

fused by the defendants, though they within a short period thereafter made a sale to the same parties for the same price.

The evidence on the part of the defendants denies that the first contact was made by the plaintiff, and asserts that the plaintiff had subsequently abandoned the contract and that the ultimate sale was made by the defendants alone. Defendants deny that there was any agreement with the plaintiff for any commission.

The trial court believed the testimony of the plaintiff. An examination of the record reveals that the finding of the trial court is amply supported by the evidence. We find no error in the rulings of the trial court on material evidentiary matters. Under such circumstances a reviewing court should not disturb the finding of the trial court. Francisco v. Coleman, 230 Ill. App. 465; Chicago Title and Trust Co. v. Walker, 328 Ill. App. 399.

The judgment of the County Court of Cook County is affirmed.

Judgment affirmed.

Robson and Schwartz, JJ., concur.

209 A

46567

6 I.A.2d 282

MARY F. POWER, Executrix of the estate of John F. Power, deceased, Appellant,	)	APPEAL FROM CIRCUIT
v.	)	COURT, COOK COUNTY.
THE CITY OF CHICAGO, a municipal corporation, Theresa Power, Grace Power, William Power and Bertha Kaske, Appellee.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This was an action instituted by plaintiff Mary F. Power, executrix of the estate of John F. Power, deceased, to recover $9,539.44 from defendant City of Chicago for payments made by plaintiff's testator of certain special assessments for street improvements of property that the testator had owned in Chicago, Illinois. Plaintiff alleged that the improvements had been abandoned by the City. The case was tried upon facts which were stipulated. In a written opinion the trial court found for the City.

The pertinent facts affecting plaintiff's claim, with the exception of those hereinafter set forth, are substantially the same as those involved in Goodman v. City of Chicago, 336 Ill. App. 126. We will, therefore, state only the additional facts. These are that plaintiff's testator owned three tracts of land on Taylor street. On June 21, 1928, he received an award of $21,000 from the City for the taking of a portion of the property that he owned and on the same date he paid special assessments against the property in the

sum of $9,539.44, for which warrants for collection had been issued by the City. In 1946 the Supreme court in the case of Woodruff v. City of Chicago, 394 Ill. 542, in a part of its opinion held that there had been an abandonment of the Taylor street improvement and that Woodruff was entitled to recover special assessments that he had paid as to that improvement. Plaintiff in the instant case filed her complaint in February of 1947. The Taylor street improvement was completed by the City on October 10, 1947. In December of 1948 the Third Division of this court decided the case of Goodman v. City of Chicago, supra, (petition for leave to appeal to the Supreme court denied; motion to reconsider the order denying petition for leave to appeal denied; and petition for certiorari to the U.S. Supreme court denied, 338 U.S. 819). The instant case remained pending until 1954 when it was brought to trial.

Plaintiff contends that the Supreme court in the Woodruff case held that the City had abandoned the Taylor street improvement and that therefore the improvement could not be revived or reclaimed by a subsequent completion of the project in 1947. In the Goodman case, a consolidation of five separate actions involving the Taylor street improvement, the trial court allowed a motion for summary judgment against the City on the grounds that the Woodruff case was res adjudicata of the issues raised by the City in their answers to the actions. After a very careful analysis of the Woodruff case and the issues that were involved, this court held that the

part of the decision in the Woodruff case pertaining to the Taylor street improvement was not final and binding as to other actions subsequently instituted involving the same improvement by other claimants. It further held that the City was not precluded from pleading the completion of the project as a defense. It cited Rudin v. King-Richardson Co., 276 Ill. App. 46, in which it was held that where the ruling of the Supreme court, in reversing a judgment and remanding a case, is based on the facts and not on the law of the case, it is the duty of the trial court on retrying the case to consider all of the evidence introduced, new as well as old. The rule that a trial court is bound by the law of the case as found by a court of review on appeal is not applicable to a case depending entirely on a question of fact. C., B. & Q. R.R. Co. v. Lee, Admx., 87 Ill. 454; West v. Douglas et al., 145 Ill. 164; P. C., C. & St. L. Ry. Co. v. Gage, 286 Ill. 213. A fortiori the effect of the ruling in the Woodruff case upon the facts before this court, must be viewed accordingly.

The Woodruff decision was based on only those facts pertaining to the Taylor street improvement that had taken place up to and including the time of the court's decision. The important fact which was not before the court and which therefore could not be considered, was that after its decision the Taylor street improvement was completed. As the Appellate court said in the Goodman case, if these facts had been before the Supreme court its decision would very probably have been different. This is very clearly indicated by another part

of the Woodruff decision pertaining to what was known as the Jefferson street improvement, which was involved in the same appeal. The court stated at p. 552:

> "The facts with respect to Jefferson street are almost the same, except that during the pendency of the lawsuit the Jefferson street improvement was completed and confirmed by the court. Since the improvement of Jefferson street has been completed it cannot be said there has been any abandonment of the proceeding to justify allowing damages because of unreasonable or vexatious delay, if the delay in installation of the improvement could be construed as giving a ground for damages."

The Goodman case held that the delay in the completion of the project and its subsequent completion were triable issues. The trial court properly held that upon the facts stipulated to by plaintiff and the City there had been no abandonment of the improvement as to the plaintiff in the instant case because the City had in fact completed it.

Judgment affirmed.

McCormick, P. J., and Schwartz, J., concur.

46592

6 Ill.App.2d 283

IN THE MATTER OF THE ESTATE OF IDA GRAY NELSON ROLLINS, deceased.	
WILLIAM J. COLE, Executor of the estate of IDA GRAY NELSON ROLLINS, deceased, Appellee,	APPEAL FROM CIRCUIT COURT, COOK COUNTY.
v.	
MARIE SETTLES WILLIAMS, EVELYN SETTLES, ROSALYN GRAY WASHINGTON, LUCILLE GRAY and BLAINE GRAY, Jr., Appellants.	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order admitting a will to probate. The case was tried by the court without a jury.

On February 27, 1953, Ida Gray Nelson Rollins executed her last will and testament. The instrument had been prepared by her attorney and was duly witnessed by Lillian Hardin, David Graham, Augustus E. Bennett, and Benjamin H. Martin. Augustus E. Bennett was a legatee under the will and was therefore disqualified as a witness. The will made bequests to Provident Hospital, The Old Folks Home, and to a number of individuals, and left the residue to William D. Sulzer and Lizzie Adams, his sister, in equal parts. On May 3, 1953, the testatrix died. On May 8, 1953, the will was filed for probate and on June 29, 1953, it was admitted to probate. An appeal was taken to the Circuit Court from the order of probate and on January 7, 1954,

a hearing was had and an order was entered admitting the will to probate and remanding the cause to the Probate court. On January 15, 1954, appellants made a motion for a new trial. The principal ground alleged was that new evidence had been discovered relating to the genuineness of the testatrix's signature. The court granted a new trial, again heard the case, and on April 27, 1954, again held that the will should be admitted to probate.

It is urged that the manifest weight of the evidence shows that the will was a forgery and that admission to probate should therefore have been denied. Ill. Rev. Stat. 1953, Ch. 3, Sec. 221; Shelby Loan & Trust Co. v. Milligan, 372 Ill. 397. Appellants rely largely upon the testimony of a handwriting expert. The testatrix was a dentist about eighty-five years old at the time of the execution of the will, and had been operated on for carcinoma of the breast two or three years before her death. Her signature on the will was wavering, irregular, and obviously made with difficulty. Vernon Faxon, a handwriting expert, testified that the signature was not that of the person who had signed admittedly genuine documents. He was questioned as to whether illness and old age might have made some changes in the testatrix's signature. He said such changes might occur, but they would not be like the changes observed which, to a handwriting expert, demonstrated illiteracy and not the infirmity of age or illness. He buttressed his opinion with details. Herbert H. Walter, a handwriting expert called as

a witness on behalf of the proponents of the will, made comparisons with admittedly genuine signatures of the testatrix and testified that in his opinion the signature on the will was genuine. He accounted for the differences by old age and illness.

Richard Noftz, an employee of the First National Bank of Chicago, testified that the testatrix was a depositor of the bank, and that he had with him two of her original signature cards; that he had occasion to observe checks drawn by Dr. Rollins in 1952 and 1953 and that the signatures on those checks did not compare with the signatures on the cards; that he held up payment until the checks had been passed upon by a supervisor. From the testimony it could be inferred that the supervisor was satisfied the signatures were genuine, although appellants seem to draw a different conclusion.

Weighing very strongly in favor of the proponents of the will is the positive testimony of witnesses that they saw Dr. Rollins sign the will; that they witnessed it at her request; that she saw them sign; and that the other witnesses were present. In addition, Dr. Maurice M. Shaw, a surgeon who attended Dr. Rollins, testified to an occasion on which in his presence she signed a check for $35 payable to him and gave it to him. The signature on that check was in a like wavering, uncertain handwriting as the signature on the will and on other documents signed by the testatrix at other times. As against such strong evidence, the testimony of appellants' witnesses cannot prevail.

Counsel rely largely on many discrepancies in testimony evoked on cross-examination as well as on changes in testimony between the first and second hearings, such as testimony that the testatrix's age was given as about 80 on the first hearing, and at the second hearing it was "moved up" to 85; that there was a conflict as to whether they were all in the room and signed in the presence of each other; as to the time they came into the room; as to whether the will was read outside their presence, and in other instances. These were all matters for the consideration of the trier of fact.

The trial court in rendering its decision said:

> "In arriving at a decision here, it is the opinion of the Court that under the Jones case, there is nothing to do but admit the will to probate.
>
> "The will will be admitted to probate; and the matter will be remanded to the Probate Court with instructions to admit the will to probate."

The case referred to is Jones v. Jones, 406 Ill. 448. It involved the will of a testatrix 80 years old who had suffered a heart attack shortly before the execution of the will. Concerning the testimony the court in that case said:

> "Both experts attempt to discern a forgery of the name of the testatrix has been accomplished because they find some variations in her signature at the date of the execution of the will compared with those of former dates.... Both experts admit these conditions [old age and illness] would bring about a variation in the signatures, but profess to find fundamental differences upon which they base an opinion there was a forgery."

In its conclusion the court said:

> "We shall not attempt to analyze the several differences claimed to have been found in the signature of Lucy Eloise Jones between 1932 and 1945, as it would serve no useful purpose, but we might remark there are

> certain characteristics in the signature contested and those of prior years which are apparently identical, but which have not been discussed or referred to by the expert witnesses. We go no further than to say that the testimony in this case is not sufficient to overcome the positive testimony of the attesting witnesses, to say nothing of the support given by the testimony of the bank cashier, who had been cashing checks of Mrs. Jones for over twenty years."

The Jones case is in many respects conclusive on the issues in the instant case.

In the case of Hauser v. Kolar, 4 Ill. App. 2d 81, (decided by this division of the Appellate court) two witnesses testified that the deceased had given the plaintiff a note ten years prior to his death. The administratrix sought by the testimony of an expert witness to establish that the signature was a forgery. We quoted from the case of In re: Will of Barrie, 393 Ill. 111, p. 123, as follows:

> "The expression in Fekete v. Fekete, 323 Ill. 468, that opinions as to the genuineness of handwriting are at best weak and unsatisfactory, and that there is much room for error and great temptation to form opinions favorable to the party calling the witness, is clearly demonstrated by the record in this case. The opinion of an expert may be of value only where it calls attention to facts which are capable of verification by the courts, and where the opinion is based upon such facts and is in harmony therewith. Lyon v. Oliver, 316 Ill. 292."

We further cited Floyd v. Estate of Smith, 320 Ill. App. 171, in which the court said that where a case had been tried by a court without a jury,

> "...we will not substitute our findings of fact for the findings of fact of the trial court, unless the judgment is clearly against the manifest weight of the evidence, citing Chamblin v. New York Life Ins. Co., 292 Ill. App. 532, and as a reviewing court, we will accept the findings of the trial judge upon questions of fact, based upon statements of witnesses whom he saw and heard testify,

unless such findings are clearly and palpably erroneous (Kinnah v. Kinnah, 184 Ill. 284)."

The errors charged and the points made that the court improperly restricted the opponents of the will in the introduction of evidence, in the cross-examination of witnesses, and in excluding competent evidence have been considered by us. Such questions are bound to arise in a bitterly contested proceeding. We do not find any error of sufficient importance to justify reversal.

Judgment affirmed.

McCormick, P. J., and Robson, J., concur.

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46600

SARAH C. BACH, NATHAN S. LEVITON, THEODORE J. LEVITON, as successor-trustees, etc., Appellees,	)	6 I.A.2d 291
v.	)	APPEAL FROM
CHAS. WEINER & SONS, INC., an Illinois corporation, Defendant,	)	MUNICIPAL COURT
and	)	OF CHICAGO.
S. HARVEY KLEIN, individually and S. HARVEY KLEIN, Assignee for the benefit of creditors of CHAS. WEINER & SONS, Inc., an Illinois Corporation, Appellant.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

On June 2, 1954, plaintiffs obtained a judgment against the defendant, Chas. Weiner & Sons, Inc., for $1,134.50. On the same day plaintiffs filed their affidavit for garnishment, naming the defendant Klein as garnishee. Klein answered that he had no funds in his possession belonging to Weiner either individually or as assignee for the benefit of creditors of Chas. Weiner & Sons, Inc. Plaintiffs contested the answer and upon a hearing the court entered judgment in favor of plaintiffs and against Klein as garnishee. From this judgment Klein appeals.

In lieu of a record of proceedings at the trial, an agreed stipulation of facts was filed. It was therein stipulated that Weiner made an unconditional assignment to Klein as assignee on May 27, 1954; that pursuant thereto Klein mailed a form of consent to plaintiffs in which they

were asked to agree to the assignment to him for the benefit of all the creditors and to state the amount of the indebtedness owing to them by Klein; that plaintiffs received the notice but refused to sign it and thereafter confessed the judgment referred to. It is admitted that Klein had sufficient funds on hand to pay the judgment and costs.

Appellant contends that garnishment cannot be maintained against property in the hands of an assignee for the benefit of creditors. This is supported by the decisions. Kimball v. Mulhern et al., 15 Ill. 205; Nimmo v. Kuykendall, 85 Ill. 476; Feltenstein v. Stein, 157 Ill. 19; Pogue v. Rowe, 236 Ill. 157, 159. In fact, the law is not disputed on this point and the only argument made is that the record discloses no pleadings and no assertions of such a defense in the trial court. The stipulation, however, is conclusively to the contrary and was submitted in lieu of a record of proceedings at the trial. Judgment must therefore be reversed.

Judgment reversed.

McCormick, P. J., and Robson, J., concur.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

6 I.A.2d 284

May Term, A. D. 1955

Term No. 55-F-10 Agenda 11

WILLIAM WILKERSON, Plaintiff, vs. GILBERT MARTINI, Doing Business as MARTINI REFRIGERATED TRANSPORTS, Defendant.	)	Action at Law No. 8911.
CITIZENS CASUALTY COMPANY OF NEW YORK, a Corporation, Intervenor-Appellant, vs. RALPH WILKERSON, CECIL FINLEY and GILBERT MARTINE, d/b/a MARTINE REFRIGERATED TRANSPORTS, Respondents-Appellees.	)	Intervening Petition. Appeal from the Circuit Court of Madison County, Illinois.

CULBERTSON, JR.

The question presented by this appeal having been decided by this Court by opinion filed May 2nd, 1955, in the case of Citizens Casualty Company of New York, a Corporation v. Richard Hurley, et al, we adhere to the conclusion reached in said opinion

and the order of the Circuit Court of Madison County will, therefore, be affirmed.

Order Affirmed.

Bardens, P.J., and Scheineman, J. Concur.

Publish Abstract only.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

16 I.2d 235

May Term, A. D. 1 9 5 5

Term No. 55F11 — Agenda 12

RALPH WILKERSON, an Infant, by His Next Friend, OTIS WILKERSON, Father and Natural Guardian, Plaintiff, vs. GILBERT MARTINI, Doing Business as MARTINI REFRIGERATED TRANSPORTS, Defendant.	Action at Law No. 8912.
CITIZENS CASUALTY COMPANY OF NEW YORK, a Corporation, Intervenor-Appellant, vs. RALPH WILKERSON, a Minor, CECIL FINLEY and GILBERT MARTINE, d/b/a MARTINE REFRIGERATED TRANSPORTS, Respondents-Appellees.	Intervening Petition. Appeal from the Circuit Court of Madison County, Illinois.

CULBERTSON, J.

The question presented by this appeal having been decided by this Court by opinion filed May 2nd,

1955, in the case of Citizens Casualty Company of New York, a Corporation v. Richard Hurley, et al., we adhere to the conclusion reached in said opinion and the order of the Circuit Court of Madison County will, therefore, be affirmed.

Order Affirmed.

Bardens, P.J., and Scheineman, J. concur.

Publish Abstract only.

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46532

6 I.A.2d 223

DONALD B. MacNEAL, INC., a corporation, Appellee, v. TIMBER STRUCTURES, INC., a corporation, Appellant.	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover for the rental of its model 25-20-ton capacity crane and booms and for damage to the crane and booms due to the alleged failure of defendant, as bailee, to return the crane and booms in as good condition as when rented and delivered. Defendant filed a cross-complaint in the amount of $967.47. The only allegation in the cross-complaint as to breach of duty is "that by reason of the failure and negligence of said Donald B. MacNeal, Inc., to furnish an adequate and proper Northwest crane, with adequate boom and cable, said Timber Structures, Inc., a corporation, claims that the following damages to it resulted, * * *," which amount included cost of material used to repair damage to a movie screen. A trial without a jury resulted in a finding and judgment for plaintiff and dismissal of the counterclaim.

The pertinent facts out of which the controversy arose are: that plaintiff made a written offer to defendant to rent its crane and boom, fully equipped, to raise the screens to be used by defendant for an outdoor theater. Each section of the screen weighed about 3 tons. The written offer included the following:

> "All of these cranes are mounted on motor truck, and we consider them to be in absolutely as good condition as new * * *.
>
> "All rentals are for bare equipment. You are to pay for the engineer, driver and fuel. We will, however, recommend good capable men to operate these units. We will furnish transportation for boom sections and jibs at a cost of $3.50 per hour while making deliveries."

The crane was delivered to the premises of defendant by the crew of men recommended by plaintiff. This crew was carried on the payroll of the defendant and paid by it for doing the work involved in raising the screens. At the appointed time, defendant's superintendent, Moore, and its foreman, Ruhl, took charge of directing the erection of the screens. The crane was driven to the front of the screens with the boom at an angle of practically 80 degrees from the ground, which required only a short radius for the crane to lift the screen. The screens were resting face down on jacks 5 to 6 feet high from the ground. The crane consisted of an 85 foot boom, with a lifting cable attached. The screens to be lifted were attached to the bottom of the supporting structure upon a concrete foundation, the attachment acting as a hinge when the screen was raised to a vertical position, and then bolted into place. The ground in front of the first screen raised was level. The ground in front of the second screen to be raised sloped upwards, was high, bumpy, rough and unsuitable for the method employed in raising the first screen.

After some discussion between Ruhl, Moore and the crane operator, it was decided to raise the second screen by moving the truck and crane to the rear of the screen instead

of the front. The engineer of the crane expressed doubts about that method. Ruhl testified that there was no harm in trying to lift the screen in that manner. The truck was then moved to the rear of the screen and was set against a concrete wall. In that position the radius of operation of the boom was approximately 65 feet and the boom lowered for lifting the screen to approximately a 30 degree angle as compared with an 80 degree angle in raising the first screen. The lifting power of the boom was thus decreased at such a radius and the strain upon the crane and cable necessarily increased.

At the first attempt to raise the second screen, the wheels of the truck rose from the ground, and it was necessary to anchor the truck with a bulldozer. At the second attempt to raise the screen after the truck was anchored, the pendant cable pulled out of its socket and broke, and the crane fell across the screen and damaged it. The crane itself was damaged. After that occurrence plaintiff furnished another crane. The ground in front of the screen to be raised was then graded, and the other screens, including the damaged one, which was repaired, were raised into place by approaching the screens from the front, as in the case of the first screen raised.

Defendant, in stating its position upon this appeal, says:

> "The principal issue in this case is plaintiff's breach of its <u>express warranty</u> that the Northwest Model 25 crane had a 20-ton lifting capacity and was 'in absolutely as good condition as new.'"

The trial judge correctly concluded that the matter of breach of warranty, express or implied, was not involved and was not the cause of the damage complained of. In his opinion filed of record, he says:

> "It is clear from the evidence, that the damage occurred as a result of the method used in attempting to raise the second screen and not because of the inadequacy or improper condition of the equipment furnished."

We think the evidence fully justifies the conclusion reached by the trial judge.

Defendant further contends that the cable which broke was defective, causing the crane to fall upon the screen; and that if there was any negligence involved in the method of raising the screen, it was the negligence of the men who were regularly the employees of plaintiff and selected by plaintiff to operate the crane at the time in question. Defendant also contends that the court committed error in refusing to permit expert testimony offered on behalf of defendant. Upon the grounds urged, defendant argues that there should have been judgment against plaintiff on its claim and judgment for defendant on its counterclaim in the sum of $543.87.

The written offer by plaintiff does not include any charge for the services of the crew of men to operate the crane. It expressly provides that defendant shall pay them, and it merely recommended the men capable of operating the crane and truck. There was no condition imposed in the offer that defendant must accept the men recommended. The very fact that plaintiff merely recommended, instead of

making it obligatory, would indicate clearly that defendant had the privilege of either hiring them or employing its own competent crew to do the work. It does appear that Moore and Ruhl, defendant's superintendent and foreman, were on the job directing the method of operation. The crew of men operating the truck and crane were under the direction and control of defendant. Under these circumstances, they became the agents and servants of defendant for the specific purpose, even though they were in the general services of plaintiff.

In Watson v. Trinz, 274 Ill. App. 379, 393, this court said:

> "The law, however, recognizes that a servant in the general service of one, may be transferred, under contract or otherwise, to the service of another so as to become for the time being the latter's servant, with all the legal consequences of that relationship. * * * In Braxton v. Mendelson, 233 N. Y. 122, it was said: 'Was the servant whose negligence injured a third party, performing work for his master within the scope of his employment or was he loaned by his master to another to do the latter's business? In the one case the general employer is liable for his torts. In the other he is not.'"

This holding was followed with approval in Onyschuk v. A. Vincent Sons Co., 277 Ill. App. 414, and Creek v. Naylor, 309 Ill. App. 601, 606. In Merlo v. Public Service Co., 381 Ill. 300, 319, the court said:

> "The question as to whether or not the relationship of master and servant exists is dependent upon certain facts and circumstances. These facts include the question of the hiring, the right to discharge, the manner of direction of the servant, the right to terminate the relationship, and the character of the supervision of the work done. Unless these facts clearly appear, the relationship cannot become purely a question of law. (Thiel v. Material Service Corp. 364 Ill. 539.) Under the common law an employee

> in the general employment of one master may, with his consent, be loaned to another and become the employee of the master to whom he is loaned. The test is whether or not the employee becomes wholly subject to the control and direction of the second employer, and free, during the temporary period, from the control of the original master."

Any negligence in the method employed in raising the screens was the negligence of defendant's servants and is not chargeable to plaintiff.

The only effort on the part of defendant to prove a defective condition of the cable was by way of hypothetical questions put to the witness Ruhl as an expert. Ruhl was not present when the cable broke. The hypothetical questions were objected to as invading the province of the court to determine the ultimate question. One of the questions objected to, typical of the others, was: "Do you know, Mr. Ruhl, what actually did cause that cable to break?" We think the court correctly sustained objections to the questions. Biniakiewicz v. Wojtasik, 339 Ill. App. 574; Gillette v. City of Chicago, 396 Ill. 619, 622; Hughes v. Wabash R. R.Co., 342 Ill. App. 159, 171; Keefe v. Armour & Co., 258 Ill. 28.

The court did allow the witness to answer in the affirmative the following question:

> "Assuming that screen was hinged and set in concrete in the situation as you saw it and told the court about, and assuming that it was thirty to forty feet in size, and assuming further that it was six tons in weight, in the normal and proper operation of this crane from the position it was located from behind, would you say that the weight of the screen or its position contributed in any way to the breaking of this cable?"

There is in this answer proof by defendant's witness that trying to lift the screen from the rear, in that position, materially contributed to the breaking of the cable.

We think upon this record the judgment of the Superior Court is correct, and accordingly it is affirmed.

AFFIRMED.

KILEY, P.J., AND LEWE, J. CONCUR.

236 A

6 I.A.2d 523

46418

CHARLES SHEMAITIS,

Appellant,

v.

LE ROY FROEMKE and CHARLES J. GALLAGHER, Impleaded,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order striking his amended complaint and dismissing Charles J. Gallagher, one of the defendants and attorney for the other defendant, Froemke, from the cause.

The amended complaint alleges in substance that Louise Shemaitis instituted a partition suit in the Circuit Court of Cook County, No. 47 C 14080, in which the plaintiff here was a defendant; that pursuant to an order of the Circuit Court the premises involved were sold to the defendant Froemke; that after the sale defendant Froemke, through his attorney, Gallagher, brought an action in forcible detainer in the Municipal Court of Chicago against the plaintiff; that while the forcible detainer suit was still pending in the Municipal Court defendant Froemke, by his attorney, Gallagher, filed a petition in the partition suit in the Circuit Court praying that the plaintiff be ordered to surrender possession of the premises to Froemke.

The amended complaint further alleges that the defendants "wickedly conspiring together" caused the plaintiff to be "unlawfully arrested and imprisoned"; that

"in pursuance of said conspiracy" they urged the court to hold the plaintiff in contempt and order him imprisoned; that "at the request and urging" of the defendants the court entered an order committing the plaintiff to jail for six months for failure to obey a void order; and that plaintiff was "forcibly, falsely, maliciously, and corruptly imprisoned without reasonable cause."

Defendant Gallagher filed a motion to strike the amended complaint, averring that he was engaged as an attorney by Froemke in connection with the partition suit; that he prepared a petition executed by Froemke which alleged in substance that Froemke purchased the premises on May 3, 1948 at a judicial sale; that on July 29, 1948 an order was entered directing Frank J. McGuire, a tenant of the premises, to pay rent to Froemke at the rate of forty dollars monthly; that on the 9th day of November 1948 an order was entered upon the plaintiff to surrender possession of the first-floor apartment; that plaintiff threatened to turn off the heat in the premises unless the tenant paid the rent to plaintiff; that on December 1, 1948, upon the tenant's failure to pay rent to the plaintiff, plaintiff locked the door of the basement and refused to permit the tenant to enter for the purpose of heating his apartment; that on December 7, 1948, the plaintiff was ordered to file his answer to the petition within three days and the matter was set for hearing on December 14, 1948; that plaintiff did not file an answer to the petition; that upon a full hearing on December 14,

1948, the plaintiff, who was represented by counsel, was ordered to show cause; that on December 16, 1948, an order was entered finding that the plaintiff refused to surrender possession of the first-floor apartment to the defendant Froemke; that upon the tenant McGuire's refusal to pay the monthly rental to plaintiff he would not allow the tenant access to the basement of the building; that plaintiff was guilty of willful contempt and ordered committed to the common jail of Cook County for a period of six months.

The motion to strike the amended complaint further alleged that the amended complaint failed to state a cause of action; and that paragraphs 9 and 10 of the amended complaint alleged conclusions.

Plaintiff contends that since Froemke filed his petition for a rule to show cause more than thirty days after the entry of the final decree in the partition suit, the Circuit Court had no jurisdiction and the order imprisoning the plaintiff was void.

The decree of partition and the master's report of sale of the premises to Froemke are not in the record. In the absence of a showing to the contrary this court will indulge in every reasonable presumption in favor of the regularity of the partition and contempt proceedings in the trial court. (Arnoldsville Building and Loan Ass'n v. Dempsey, 339 Ill. 304.) See Vol. 2, Ill. Law and Practice, Chapter 13, Section 711.

The rule with reference to the court's loss of jurisdiction over its judgments after the expiration of the term

merely bars the court's right to alter, modify or change them but does not preclude their enforcement as originally rendered. 49 CJS, Section 585, page 1072. The petition filed by Froemke in the Circuit Court was, in effect, an application for a writ of assistance. This is a summary proceeding the sole object of which is to put a person in possession who has purchased property at a judicial sale under a decree in chancery. The writ of assistance is properly employed whenever a court of equity having jurisdiction of the person and property in controversy has determined the rights of the litigants to title or possession of real estate or has agreed to a sale of the property, the writ being part of the process employed in enforcing the decree itself. (Stubbs v. Austin, 285 Ill. App. 535.)

False imprisonment consists in unlawful restraint against the will of a person of his liberty or freedom of locomotion. False arrest is one means of committing a false imprisonment. In false imprisonment malice is usually material only to the issue of damages. If the imprisonment is under legal authority it may be malicious but it cannot be false. (Shelton v. Barry, 328 Ill. App. 497.) In the instant case plaintiff's imprisonment was the result of his being adjudged guilty of contempt for refusing to surrender possession of the premises he wrongfully occupied after Froemke had purchased them at the judicial sale and, since plaintiff's imprisonment was under legal process, the defendant Gallagher cannot be charged with false imprisonment.

The only allegations relating to the charge of conspiracy in the amended complaint appear in paragraphs 9 and 10, which read: "That thereafter the said defendants wickedly conspired together to cause said Charles Shemaitis to be unlawfully arrested and imprisoned without any just cause.....On December 16, 1948, the defendants in pursuance of said conspiracy urged said court to hold said Charles Shemaitis in contempt and order him imprisoned." No facts are alleged. These allegations are mere conclusions.

For the reasons given, the order striking the amended complaint and dismissing the defendant Charles J. Gallagher is affirmed.

ORDER APPEALED FROM AFFIRMED.

KILEY, P. J., AND FEINBERG, J., CONCUR.

237 A

46533)
) Consolidated
46641)

6 I.A.2d 224

CHARLES J. SHEMAITIS, Appellant, v. LOUISE SHEMAITIS and LE ROY FROEMKE, Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

These appeals were consolidated for argument in this court. Plaintiff filed a complaint containing two separate and distinct causes of action. In the first branch of the case he seeks to set aside a partition decree and a judicial sale at which defendant Froemke was the purchaser. In the second branch of the case plaintiff attacked the validity of a divorce decree obtained by plaintiff's wife, Louise Shemaitis, in Arkansas.

In cause number 46533, involving the first branch of the case, plaintiff appeals from a decree striking the complaint and dismissing the cause as to Froemke. While the appeal in cause number 46533 was pending in this court, the trial court disposed of the second branch of the case by setting aside the Arkansas divorce decree. In cause number 46641 plaintiff appeals from an order entered during term time vacating the decree entered in the second branch of the case.

To make clear the issues presented in these appeals it is necessary for us to state the relevant facts.

After being married about four years, the plaintiff, Charles Shemaitis and Louise, his wife, separated. At the time of their separation (July 3, 1947) they owned, as joint tenants, the premises located at 317 Englewood Avenue, Chicago, Illinois. The premises were improved with a two-flat building. The Shemaitises occupied the first floor and a tenant occupied the second floor. During the period of their marital relationship and following their separation plaintiff and Louise Shemaitis filed numerous suits which resulted in protracted litigation.

November 3, 1945 Louise Shemaitis instituted suit against the plaintiff and others in the Circuit Court of Cook County, case number 47 C 14080, to partition the premises owned jointly. March 4, 1948 a decree was entered in the partition suit and on March 29th a decree was entered approving the commissioner's report and directing the sale of the premises. The defendant Le Roy Froemke, purchased the premises at the judicial sale and on May 6, 1948, the court approved the sale to Froemke.

In September 1947, while the partition suit was pending, Louise Shemaitis filed suit against the plaintiff for divorce in Garland County, Arkansas, where she had married the plaintiff. In that suit plaintiff was served by publication and Louise Shemaitis obtained a divorce decree by default.

March 24, 1950 plaintiff filed a complaint in the nature of a bill of review against Louise Shemaitis and Froemke in the Circuit Court of Cook County, case number 50 C 2700. This complaint contained two separate causes of action. Briefly summarized, in the first branch of the complaint plaintiff prayed that the decree of partition entered on March 4, 1948 in case number 47 C 14080 and the sale of the premises to Froemke be set aside for the following reasons: (1) that plaintiff was never notified to appear or testify; (2) that the sale price to Froemke was inadequate; and (3) that no provision was made for plaintiff's alleged homestead and dower rights. In this suit Froemke filed a motion under sections 45 and 48 of the Civil Practice Act, to strike the complaint. June 15, 1951, a decree was entered sustaining Froemke's motion to strike cause number 50 C 2700 as to him, with prejudice, for want of equity. Plaintiff filed a petition for leave to appeal from this decree in this court where leave to appeal was denied on July 22, 1952. No appeal was prosecuted to review the judgment in case number 50 C 2700. In cause number 46533 in this court the complaint was filed in the Circuit Court of Cook County on September 3, 1953. The allegations of this complaint and the parties are the same as those of the complaint previously filed by plaintiff in case number 50 C 2700. Defendant Froemke again filed a motion under Section 48 of the Civil Practice Act, averring that it involved the same causes of action and parties and was therefore barred by the prior

judgment in case number 50 C 2700. May 28, 1954, on Froemke's motion to strike, the complaint was stricken and the cause dismissed with prejudice for want of equity as to the defendant Froemke, and the premises involved were "dismissed from this proceeding." Subsequently plaintiff made a motion to vacate the order of dismissal entered May 28, 1954. This motion to vacate the order of dismissal was denied June 25th. Plaintiff appeals from the decree of May 28 and the order of June 25, 1954.

A cause of action which has been finally determined is conclusive as to all immediate parties to the suit and all persons in privity with them. (Leitch v. Hine, 393 Ill. 211; C. & W. I. R. R. Co. v. Alquist, 415 Ill. 537.) Under the foregoing authorities the judgment in case number 50 C 2700 is conclusive and bars the plaintiff from again bringing these matters into litigation.

Plaintiff objects to the form of defendant Froemke's motion under Section 48 because it asks to "strike the complaint" instead of "dismiss the complaint." Plaintiff argues that under a motion to strike if portions of the complaint were stricken, leave to amend the complaint could have been granted. This point was not raised in the trial court. In the concluding paragraph the motion prays for judgment against the plaintiff and in favor of Froemke, with costs. This we think is tantamount to asking for a dismissal of the complaint. In any event the plaintiff did not tender any amendment to the complaint or an amended complaint, nor did he ask leave to file an amended complaint. Under these circumstances

plaintiff's position is untenable. See Aaron v. Dausch, 313 Ill. App. 524.

Plaintiff insists that the decree dismissing the cause is defective for the reason that it also dismisses the real estate which Froemke acquired as a purchaser at the judicial sale in the partition proceeding. Undoubtedly this provision was placed in the decree so that the first branch of the case which concerns the interest of Froemke acquired at the judicial sale in the partition suit would not be involved in the second branch of the case which relates solely to plaintiff's attack on the Arkansas divorce decree. We think the provision of the decree dismissing the real estate was superfluous but in any event it did not prejudice the plaintiff. For the reasons given, the decree and order appealed from in case number 46533 are affirmed.

In case number 46641 the record shows that in the second branch of the case the chancellor found that Louise Shemaitis was not a bona fide resident of Arkansas at the time she obtained a divorce decree from the plaintiff in that suit, and held the decree to be null and void.

June 23, 1954 the court entered a decree drafted by plaintiff's counsel. This decree found, among other things, (1) that plaintiff has not in any way relinquished his dower and homestead rights or any other rights that he has had in and to the premises known as 317 Englewood Avenue, Chicago, Illinois; that plaintiff is entitled to his dower and homestead rights and his other rights in and to the premises

described in the complaint and is entitled to possession thereof. Within thirty days after this decree was entered defendant Froemke filed a motion alleging that the decree affected his rights and that he had received no notice of the hearing on the second branch of the case. When the particular provisions of the decree affecting defendant Froemke's title were called to the attention of the chancellor he vacated the decree in the second branch of the case. The chancellor suggested to plaintiff's counsel that he "draw a proper decree" by eliminating those provisions which purported to determine such matters as plaintiff's alleged rights of dower, homestead, and possession of the premises. But plaintiff refused to make the suggested changes and subsequently made a motion to vacate the order setting aside the decree. In case 46641 plaintiff appealed from the order entered October 14, 1954 vacating the decree and the order of November 12, 1954 denying plaintiff's motion to vacate the former order.

During the thirty-day period a decree rests in the breast of the court and the court might at any time during the term amend it or set it aside of its own motion or for good cause shown, as justice and right of the case might seem to require. (Barnard v. Michael, 392 Ill. 130.) All courts of record have inherent power to vacate or set aside judgments or orders during the term time in which they are rendered. The power exists independently of any statute and has its foundation in the common law. (Department of Public Works v. Legg, 374 Ill. 306.)

When the decree was entered in case number 46641 defendant Froemke was no longer a party defendant in the second branch of the case, and the first branch, where defendant Froemke's rights in the premises in question were involved, had been completely disposed of. In our view the chancellor had the power to vacate the decree in the second branch of the case within thirty days after its entry, on the following grounds: (1) that the trial court no longer had jurisdiction of Froemke; and (2) that the decree did affect Froemke's title. Defendant's motion to dismiss the appeal in case number 46641, which was taken with the case, is overruled.

For the reasons stated, the decree and order appealed from in cause number 46533 are affirmed, and in cause number 46641 the orders of October 14, 1954 and November 12, 1954 are affirmed as to the defendant Froemke.

AFFIRMED.

KILEY, P.J. AND FEINBERG, J., CONCUR.

General No. 10829 Agenda No. 4

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1955

ERNEST F. HEIDEN, Appellant,	)	
-vs-	)	APPEAL FROM THE
JOHN R. TAMBONE, Appellee.	)	CIRCUIT COURT OF McHENRY COUNTY.

ROVALDI, --J.

This appeal is prosecuted from the order of the circuit court entered December 27, 1954 granting defendant's motion to dismiss the second amended complaint.

An examination of both the Abstract and the Record in this cause discloses that after the granting of the aforesaid motion, no further action was taken by plaintiff, and no final judgment was entered.

An order sustaining a motion to strike a complaint, or an amended complaint, standing alone does not end the proceeding and is not a final appealable order. Doner v. Phoenix Land Bank, 381 Ill. 106; Barber v. Wood, 318 Ill. 415; Trebbin v. Thoeresz, 316 Ill. 30; and Moroni v. Albers, 301 Ill. App. 633.

It is essential to finality that the case be disposed of, not merely by striking the complaint, but by an order or judgment that finally disposes of the case. Where a motion to dismiss a complaint is sustained, it must be followed by a judgment for the defendant to the

effect that the plaintiff take nothing by virtue of his action and that the defendant go hence without day, or words of similar import and meaning. Board of Education v. Board of Education, 301 Ill. App. 228.

Where no final judgment appeared in the record, the appeal would be dismissed. Palefrone v. Shelton, 337 Ill. App. 99.

Accordingly, the appeal herein ~~xx~~ is dismissed.

Appeal dismissed.

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6 I.A.2d 368

46321

WESTERN CASUALTY & SURETY COMPANY, a corporation, Appellee, v. EUSEBIUS J. BIGGS and ANDREW B. GREGORY, d/b/a BIGGS AND GREGORY and BIGGS CONSTRUCTION COMPANY, a corporation, Defendants, EUSEBIUS J. BIGGS, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In 1938 Eusebius J. Biggs and Andrew Gregory, doing business as Biggs and Gregory and Biggs Construction Company, were awarded a contract to build a post office for the Government at Newton, Illinois. They furnished a general contractor's performance bond and pursuant to the Miller Act, 40 U.S.C.A. §270a (a) (2), furnished a payment bond, with the Western Casualty and Surety Company as surety, in which the contractors promised that they would promptly pay the amounts due to all persons supplying labor and materials in the construction of the post office. In 1940 the surety company, in order to protect itself from liability on the payment bond and to prevent circuity of action, sued in equity in the United States Court for the Northern District of Illinois, Eastern Division, against the principals on the payment bond, alleging that the contractors owed the subcontractors and material men for labor and material in the construction of the post office in the amount of

$5,800.00; that the general contractors had collected from the Government all but $3,500.00 of the contract price; that the general contractors were insolvent and unable to pay the debts incurred for labor and materials; and that demand had been made on the surety to pay for the labor and materials. The surety prayed that a receiver be appointed to hold all the funds until the further order of the court; that the defendants be enjoined from collecting and disposing of the funds; and that the court adjudicate plaintiff's rights, declare a lien thereon and declare that all the funds be applied to the exoneration of plaintiff's liability.

On July 8, 1940 the District Court ordered that all money due or to become due to the defendants be paid jointly to the plaintiff and defendants, deposited in a special joint bank account and applied to the payment of the subcontractors' claims. At the time the order was entered Mr. Biggs was in court representing himself and the defendant corporation and agreed that the order be entered. Thereafter the subcontractors came into court with intervening petitions and claims for alleged unpaid balances due them. After hearing evidence the court determined the amount due the subcontractors and payment was made from the special joint account. When all the subcontractors had been paid the surety company was awarded judgment for $1,945.78, the amount it had been required to pay as surety on the payment bond. On a motion of the surety company the amount of the judgment was later reduced to $1,232.96. No appeal was taken from the judgment.

On October 29, 1953, more than ten years after the judgment was taken by the surety company, one of the defendants, Mr. Biggs, filed a motion to set aside the judgment against him and the other defendants, to recover the money paid to the plaintiff and the subcontractors under the judgment, to recover damages against the surety company for allegedly colluding with the intervening subcontractors to collect unjust claims and to have counsel for the surety company barred from further practice of law before the District Court. The District Court entered judgment adverse to the general contractor and he appealed. In that appeal Mr. Biggs contended that the original suit was brought by the surety company under the Miller Act, which provides that a suit instituted thereunder shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere. He argued that under that section the District Court for the Northern District of Illinois, Eastern Division, had no jurisdiction over proceedings concerning a building located in Newton in the Southern District of Illinois. The United States Court of Appeals (217 Fed. Rep. 2d. 163) in an opinion filed October 18, 1954 (rehearing denied December 27, 1954,) held that the surety could not have brought an action under the Miller Act, which provides only for an action on the surety bond by one who has furnished labor and materials and has not been paid. It sustained the right of the surety company to bring a suit to enforce its equity of exoneration from appellant. The court said (165):

"Federal jurisdiction in this suit was based on diversity of citizenship, thus, it was properly brought in the Northern District of Illinois where the individual defendants resided and where the corporate defendant had its principal place of business. 28 U.S.C.A. §1391(a) and (c).

"Appellant cannot at this late date be heard to say that the original judgment entered July 8, 1940, was obtained by collusion between counsel for the appellee and the court. The record shows that Biggs was present and agreed in open court that all moneys due or to become due on the contract should be paid jointly to the contractors and the surety company, should be deposited in a joint account, and should be disbursed in the payment of just claims for labor and material used in the construction of the post office. The court determined the amount which was justly due to the subcontractors who filed intervening claims against the funds which the court had ordered held for the purpose of paying such claims.

"The subcontractors in their intervening petitions stated that they were proceeding under the Miller Act. Appellant Biggs has seized upon this statement to renew his argument that the court lacked jurisdiction. No matter what the subcontractors thought or what they said in their intervening complaints, it is clear that they intervened in this equitable proceeding to claim and prove their right to part of the funds held under the order of the court for payment of the claims of those who had furnished labor and material in the construction of the Newton Post Office.

"The record presents no evidence of fraud or collusion practiced by anyone against the appellant Biggs. On the contrary, the picture it gives of the suit is one of complete fairness.

"Appellant's allegations of fraud and collusion seem to grow out of the fact that he entirely failed to understand the nature of the equity proceedings in which he was a party, and refused to employ counsel who would have understood and have been able to explain the proceedings to him. The record convinces us, however, that although appellant's understanding of the case was impaired by his failure to be represented by counsel, no one took an unfair advantage of him. The judgment of the District Court is Affirmed."

The surety company filed a verified statement of claim in the Municipal Court of Chicago against Eusebius J. Biggs, Andrew B. Gregory and Biggs Construction Company, a corporation, praying for a judgment of $1,947.07, based upon the judgment in the District Court of the United States on November 6, 1942, plus interest thereon. Mr. Biggs was the only defendant served with process and the litigation

proceeded against him only. The verified answer stated that the judgment sued upon was based on intervening petitions and counterclaims filed in plaintiff's action in the District Court which were filed under the Miller Act; that under that Act the claims represented by the intervening petitions and counterclaims could be prosecuted only in the name of the United States in the District Court in the district in which the structure was erected and not elsewhere; and that the intervenors and counterclaimants had sued in their own name in the District Court for the Northern District of Illinois, whereas the jurisdiction of the subject matter was solely in the District Court for the Southern District of Illinois. Plaintiff filed a reply denying that the judgment was rendered under the Miller Act and denying that the judgment sued upon was void because the court lacked jurisdiction of the persons or the subject matter. Plaintiff then filed a motion for summary judgment, attaching as exhibits certified by the Clerk of the District Court the complaint filed therein, the answer thereto, the summons and the marshal's return, the judgment order entered November 6, 1942, and an amendatory judgment entered February 23, 1943, reducing the amount of the judgment.

The defendant filed his affidavit of merits to the motion for summary judgment and his countermotion for summary judgment and attached as exhibits (1) an agreed order entered into July 8, 1940 providing for joint control of funds held by the United States Government in connection with the

construction of the post office; (2) the intervening petitions and counterclaims, each alleging that it was being filed pursuant to the Miller Act; (3) a copy of a letter from the United States Attorney to defendant, refusing discovery because the United States was not a party to the suit; (4) the judgment order entered January 26, 1942 against defendant and Gregory, the corporation, the surety and in favor of the petitioners and providing for judgment over by the surety company against Biggs and Gregory and the corporation; (5) the judgment order entered June 5, 1942 in favor of petitioner containing the same provisions as the judgment order of January 26, 1942; and (6) the petition of the surety company filed November 6, 1942 for judgment over against defendant, his partner and the corporation.

Plaintiff's motion for summary judgment, the defense thereto and the defendant's countermotion for summary judgment came on for hearing on May 4, 1953. No one appeared for the plaintiff and the court entered an order overruling the plaintiff's motion for summary judgment, sustaining defendant's motion for summary judgment and entered a finding for the defendant. On May 5, 1953, on notice of motion and on affidavit of counsel, plaintiff petitioned the court to vacate the order of May 4, 1953. The affidavit of Leonard Brody recited that he is a duly licensed lawyer associated with the firm representing the plaintiff; that he was charged with the prosecution of the case which was set for hearing on May 4, 1953 at 2:00 P.M.; that on that afternoon he answered

certain other calls; that he was unavoidably detained and did not reach the courtroom where the motions in the instant case were set until 3:00 P.M.; and that at that time he learned of the orders that had been entered. On May 6, 1953 the court vacated the order of May 4, 1953 and set the motions for hearing on May 20, 1953. On that date the court entered judgment on plaintiff's motion for summary judgment and denied defendant's countermotion. On June 18, 1953 the court denied defendant's motion to vacate the judgment order of May 20, 1953. Defendant appeals from the judgment of May 20, 1953 and the order of June 18, 1953, and asks that they be reversed and that the cause be remanded with instructions to enter judgment for him or to grant a new trial.

The defendant asserts that the court erred in setting aside the order entered on May 4, 1953. The Practice Act provides that the court may in its discretion before final judgment, set aside any default and may within thirty days after entry thereof set aside any judgment or decree upon good cause shown by affidavit, upon such terms and conditions as shall be reasonable. The motions were set for hearing at 2:00 P.M. on May 4, 1953. The affidavit of Mr. Brody shows that he failed to answer the call because he was detained in another courtroom and that he did arrive to answer the call at 3:10 P.M. A motion to set aside a judgment made within thirty days is addressed to the sound discretion of the court. We find that the trial judge did not abuse his discretion in setting aside the ex parte order entered May 4, 1953.

Defendant maintains that plaintiff's motion for summary judgment did not comply with the rules of the Municipal Court and the Supreme Court pertaining to procedure in motions for summary judgment. The affidavit in support of plaintiff's motion sets forth the name of affiant and identifies him as an attorney associated with plaintiff's attorneys and attached are certified copies of the pertinent proceedings in the District Court including the judgment, which is the subject matter of plaintiff's claim. We are satisfied that there was a substantial compliance with the requirements of the statute and the rules pertaining to summary judgment.

Defendant, pointing out that a motion for summary judgment will not lie if the affidavit of merits sets forth factual matter determinable only by a trial, states that his affidavit of merits and countermotion for summary judgment set forth a discrepancy in the District Court judgment order of June 5, 1942, and the petition of plaintiff for judgment over; that the defendant further alleged that plaintiff had not paid the amounts it had represented to the federal court to have been paid; that to the extent that the amounts were not paid, the judgment would be excessive; and that these were matters of defense that required proof and were not determinable on a motion for summary judgment. Where the affidavits in a summary judgment proceeding show that there is a factual issue, that issue must be determined in a trial. The rule relied upon by the defendant has no

application. Defendant, in his affidavit of merits, sought to collaterally attack the judgment entered in the District Court. This cannot be done. It is not disputed that the District Court rendered a judgment against defendant in the sum of $1,232.96. It was not claimed that he paid any part of the judgment. The court was right in granting plaintiff's motion for summary judgment as there was no triable issue of fact.

The next point argued by the defendant is that the judgment in the District Court was void because that court lacked jurisdiction to hear the intervening petitions and counterclaims on which the judgment is based. This issue was determined adversely to the contention of the defendant in the District Court and the judgment of that court was affirmed in the Court of Appeals. The defendant had his day in court on the issue. The federal court had jurisdiction of the subject matter and the parties. The Municipal Court properly recognized the validity of that judgment and that it could not be attacked collaterally. The defendant concludes his brief with the statement that it is the duty of the court to determine jurisdiction and that the judgment of the District Court in favor of one of the petitioners, in addition to being void because that court lacked jurisdiction, was invalid because that court lost the jurisdiction it had improperly assumed. The court in the instant case fulfilled its duty when it entered judgment in favor of the plaintiff.

The court necessarily determined that the District Court had jurisdiction of the subject matter and of the parties.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., AND NIEMEYER, J., CONCUR

229 A

46599

6 I.A.2d 308

WILLIAM F. HANSSEN, Appellant,	)	
	)	APPEAL FROM SUPERIOR
v.	)	
	)	COURT, COOK COUNTY.
IRENE F. HANSSEN, Appellee.	)	

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, William F. Hanssen, appeals from an order of the Superior Court denying his verified petition to dismiss the cause for failure to present a decree for more than four months after the hearing or, in the alternative, to reopen the cause and allow him to present further testimony; and from the subsequent decree for separate maintenance entered in favor of defendant. Defendant-appellee has filed no brief.

In his complaint for divorce plaintiff alleged cruelty. Defendant answered, and filed a counterclaim for separate maintenance, also charging cruelty. Thereafter plaintiff filed additional pleadings, and the cause was ultimately heard on his third amended and supplemental complaint. Pursuant to a full hearing by the chancellor, he ordered a decree to be written up finding the equities in favor of defendant, granting her separate maintenance as prayed, and dismissing the complaint for want of equity. The hearing was had November 9, 1953. On March 9, 1954, no decree having been presented in the interim, plaintiff filed a petition alleging in substance that no decree had been presented, and that for want thereof the cause should be dismissed or, in the alternative, that the cause should be reopened for the purpose of permitting him to present additional

evidence. He alleged generally that he had additional witnesses, not previously introduced at the trial, who would sustain his charges of cruelty, without specifying in detail what they would testify to; he also alleged that the testimony of defendant was not corroborated by two witnesses. He further alleged that at the time of the hearing defendant was in contempt of court for violation of the provisions of an injunction theretofore issued restraining her from disposing of certain property in her possession; also that he (petitioner) was subsequently informed that during the course of the trial defendant left the witness stand and conversed with her mother in the hallway about her subsequent testimony, in violation of the court's order excluding witnesses - an action characterized in the petition as fraud on the court and contemptuous.

We have read the petition carefully. The allegations therein are insufficient to have required the court to reopen the case on the ground of newly discovered evidence. Having heard the matter fully, the court did not abuse its discretion in denying the petition. Nor was the failure of defendant to present a decree within four months sufficient reason for dismissing the suit. The rule of court requiring presentation of a decree within ten days is applicable only to default matters.

For the reasons indicated, the decree is affirmed, as is the order of the court denying the petition.

Decree and order affirmed.

Burke, P.J., and Niemeyer, J., concur.

Abstract

Con. No. 10028 | 6 Ill. App. 2d 108 | Agenda No. 3

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AT [illegible], A. D. 1955.

[illegible] a municipal corporation, Appellant, -vs- [illegible] Co., Appellee.	Appeal from the Circuit Court, Lake County.

CROW, J.

This is an appeal by the plaintiff from an order dismissing a suit seeking (1) to enjoin the remodelling, reconstruction and enlarging of defendant's dwelling; (2) to require the defendant to remove the construction completed on defendant's dwelling, all for an alleged violation of the building code of plaintiff, a municipal corporation.

The complaint for injunction alleges that defendant has begun remodeling and reconstructing a dwelling so as to effect a three or more family dwelling contrary to the laws and ordinance of the Village, and the covenants and restrictions in a certain deed and plaintiff asks that defendant be restrained from (1) continuing to remodel or reconstruct the

premises so as to enlarge the same into more than one dwelling (2) be commanded to cause the premises to be restored as a one family residence (3) be restrained during the pendency of this suit from remodeling or reconstructing the same into more than a one family dwelling.

A review of the facts in evidence discloses that defendant on October 15, 1952, purchased Lots 30, 31 and 32, Block 139, Round Lake Beach, the same being an addition to the Village of Round Lake Park, Lake County, Illinois, upon which said lots there was a two family dwelling which had been in use as a two family dwelling since 1946. The Village of Round Lake Park, plaintiff, passed and approved an Ordinance on January 9, 1948, containing, among other provisions, Sec. 59 and Sec. 70. Section 59 is as follows:

> "Section 59. (Buildings must conform to this Ordinance.) No wall, fence, building or structure of any kind or description or part thereof shall hereafter be erected, constructed, altered, repaired or removed within the Village of Round Lake Park, except in conformity with the provisions of this Ordinance."

and Section 70 -

> "Section 70. (Single-Family Dwellings) not more than one single or one-family residence or dwelling house shall be erected upon any lot in the Village, except as hereinafter set forth. A garage up to two-car capacity may be built on any lots as an integral part of the house, or on the rear of the lot, except on lots fronting on the parkway along the channel where garages up to two-car capacity may be built but must be an integral part of the dwelling. No garage shall be built prior to the erection of the dwelling house, or used for residential purposes. Such garages shall conform in color and design to the dwelling house."

On August 14, 1953, defendant applied to the Village Clerk for a building permit on said Lots 30, 31, 32, indicating a cost of $2500 for a residence containing two families, with construction characteristics - "bathroom and basement floor". Applicant agreed in said application to comply with all provisions of the building code of the Village. A permit was granted by the Clerk on said application applicable to said Lots 30, 31 and 32, and said Clerk noted thereon "to erect or repair a basement floor".

Prior to the issuance of the aforesaid permit, defendant's premises consisted of a frame building with an unfinished basement, the same containing an old fashioned furnace, coal bin, and a place for the storage of wood, with partitions, and a garage with a dirt floor. The main floor was equipped for living quarters and the second floor also for living quarters. On March 21, 1954, the building inspector for plaintiff looked at the premises and found in the basement a cement floor, partitions with bathroom installed, a cabinet sink, wall cabinet, gas stove all hooked up and operating, asphalt tile floors, and a bedroom with attached closet. The outside appearance of the house had been changed somewhat with canopies covering the entrance, side walls and doors. Substantially all repairs and reconstruction had then been completed. The premises (basement) as reconstructed was occupied by the defendant before the complaint for the injunction was filed.

Plaintiff's theory is that (1) the Court erred in denying the Prayer for Mandatory Injunction because of defendant's failure to comply with the building code and (2) because of de-

fendant proceeding to construct a complete and additional basement apartment after receiving a building permit to construct a cement floor and add a basement toilet, all in an area for single family dwellings.

It is clear that plaintiff, by its complaint, is seeking solely to prevent the defendant from remodelling or reconstructing the premises on the Lots in question so as to enlarge it into more than one dwelling, or more than one family dwelling, and our inquiry as to the correctness of the finding and order of the trial court will be limited to this issue.

Under the facts herein, we believe a non-conforming use of the premises existed prior to the passage of the Ordinance on January 9, 1948. The premises were in fact a two-family dwelling house immediately prior to January 9, 1948. Defendant cites, as applicable to the facts herein, a limitation on Cities and Villages, being a provision of the ILL. REV. STATS. contained in C A P. 24, Sec. 73-1, which is as follows:

> "The powers conferred by this article shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted * * * "

We must agree with the defendant, after an examination of the Ordinances of the Village of Round Lake Park, passed January 9, 1948, that there is no reference or provision therein in regard to non-conforming use of any dwellings within the Village, nor is there any specific restriction upon the increase of intensity of any such non-conforming use. However, a regulation as to non-conforming use by limiting the extension of it, is clearly within the power of the Village. (WALSH Lodge Co. vs. Village of GLENCOE, 390 Ill. 138). But here it was not exercised by ordinance. We do not believe that any section of the Ordinance

of the Village herein referred to, specifically or by implication, prohibits any extension in volume of the non-conforming use. We must, therefore, conclude that the construction done by the defendant under the permit in question have not changed the non-conforming use or extended it beyond the premises. (PEOPLE ex rel. [illegible] v. [illegible], 334 Ill. App. 557 (2nd Dist.)).

The complaint seeks no relief for violation of the building code by failure of the defendant to submit plans and specifications for the approval of the Village Building Commissioner and this theory of the plaintiff, argued, will not be considered on this appeal.

The finding and order of the trial court in dismissing plaintiff's complaint for want of equity is right and should be affirmed.

AFFIRMED

Dove, J. Concurs

Abstract

General No. 10674 Gen. Ab. 11

In The

Appellate Court

Second District

February Term, A.D. 1966.

6 I.A.2d 409

MAX LITSELMAN and SOL LITSELMAN, Petitioners-Appellees. v. Carl F[illegible], Building Inspector of the City of Rockford, and CITY OF ROCKFORD, a municipal corporation, Respondents-Appellants.	Appeal from Circuit Court of Winnebago County.

DOVE, J.

Petitioners, Max Litselman and Sol Litselman, filed their amended petition in the Circuit Court of Winnebago County against Carl Erskine, Building Inspector of the City of Rockford, and the City of Rockford, a municipal corporation, praying for a writ of mandamus to compel respondents to issue to them a building permit for the construction of a shopping center consisting of one building to house six stores on a certain parcel of real estate which petitioners owned and which is described in their amended petition.

The amended petition consists of three counts. Count 1 alleged that the petitioners were residents of the City of Rockford and the owners in fee simple of certain described real estate situated at the southeast corner of the intersection of Rural Street and Prospect Street in the City of Rockford; that

the respondent, Cardine, by the ordinance of the City of Rockford and as such was authorized by the ordinances of the City of Rockford to grant permits to construct or erect buildings within that city; that petitioners made application to said respondent for a building permit to construct certain building commonly known as a bowling center upon the described real estate; that they had complied with all of the requirements relative to the building code and the ordinances of the City of Rockford; that a part of the described property, being a tract one hundred fifty feet square, hereafter referred to as "Parcel 1", is located on the southwest corner of the intersection of Prospect and Rural Streets and zoned for "Local Business" by the zoning ordinance of the City of Rockford in 1923, which is still in full force and effect; that said zoning ordinance permitted the erection by the petitioners of a bowling center building; that in 1957, and prior to 1960, the City of Rockford passed zoning ordinances which reclassified Parcel 1 as "A-Residential", but that said zoning ordinances are void as to Parcel 1 because these ordinances were passed, (a) without notice to the then owners of the property; (b) no notice of hearings on them before the Zoning Board of Appeals was published as required by the zoning ordinance of 1923 under which the property was originally zoned, or in conformity with the statutes of the State of Illinois; (c) no notice of hearings before a committee of the city council relative to changes in zoning was ever published as required by ordinance and by statute;; (d) no hearings or minutes of hearings were had or made on the rezoning of this property before the Zoning Board, and (e) no hearings were had or minutes of hearings made before the committee of the city council as required by the zoning ordinance of the City

of Rockford of 1923 and by the statutes of the State of Illinois.

Count II, in addition to alleging as all necessary the building code and the refusal of the respondents to issue the building permit, all as alleged in Count I, alleged that due to the balance of the petitioners' property, that is, all of their property except one hundred fifty foot square tract referred to as Parcel 1, which balance in fact of land (225' x 225' x 418.9' x 76', or hereafter referred to as "rear"), was classified as "C-Residential" under the ordinance of the City of Rockford of 1957. This count then alleged that petitioners applied to the Zoning Board to change the R-4 residential classification on Parcel 2 to that of Local Business, which classification was rejected by the city council and concluded that said rejection by the city council of the classification as established by the Zoning Board was arbitrary, unreasonable and capricious and constituted an unreasonable and unconstitutional restriction on the use of the property by petitioners and was, therefore, void.

Count III, in addition to the formal matters with reference to the ordinance by the petitioners with the Building code and the refusal of the respondents to issue the permit, alleged that as to the whole of the petitioners' property, consisting of both Parcels 1 and 2, petitioners filed an application with the Zoning Board requesting that said property be zoned as Local Business, and that said Board granted their request, but that the city council rejected the recommendation of the Zoning Board and refused to classify their property as Local Business and that such rejection was arbitrary, unreasonable and capricious and constituted an unreasonable and unconstitutional restriction on petitioners' property and was thus void.

By their answer to the amended petition, the respondents admitted compliance by petitioners with the building code, the supplying of sufficient plans and specifications and certain other formal matters, but denied all of the allegations charging that the zoning ordinances of 1947 and 1950 were invalid, and further denied that the decisions of the city council in rejecting the classifications of petitioners' property by the zoning Board was arbitrary, unreasonable and capricious. Upon the issues as made by the pleadings, the trial court entered an order directing the building permit to be issued, and also entered an injunction prohibiting the petitioners from erecting any kind of buildings upon the real estate in question other than that specifically specified by the building plans submitted with their application for a building permit. To reverse this order, respondents appeal.

The Trial court found that notice of the public hearing on the proposed change of zoning of the real property from Local Business to A-Residential by the zoning ordinance of 1947 was not given as required by law; that no public hearing was ever held on the proposed change before the zoning board of appeals of the City of Rockford or before a committee of the city council, or before the city council, and that the official minutes and official records of the Zoning Board of Appeals and of the city council, show no evidence of a hearing upon the proposed change of zoning of petitioners' property as required by law. The court made similar findings with reference to the zoning ordinance of the City of Rockford of 1950, wherein it was sought to retain the zoning classification of the petitioners' property established by the ordinance of 1947. The court also found that the highest and best value of the property in question is for Local Business.

[illegible] erred in finding that the [illegible] are invalid.

[illegible] contention that [illegible] corporate activities, [illegible] evidence of its contents, [illegible] such orders [illegible] entered in the court [illegible] Rev. St. [illegible] 4 Sec. [illegible]) [illegible] or on the validity of the [illegible] introduction of the [illegible] certified copy of the [illegible] it is necessary that the [illegible] not formally adopted. [illegible] 26 Ill. 69; [illegible] or [illegible] v. [illegible], 208 Ill. 414. [illegible] record no evidence [illegible] by the respondent, nor [illegible] court's finding that the [illegible] to these ordinances [illegible] hearings held thereon. [illegible] that notices were given or a hearing had; however, [illegible] discussion relative to the case in this court, [illegible] stipulated that no records can be found of the giving of such notices and the action of such [illegible] are ever given or hearings ever held. If [illegible] to controvert the fact that the ordinances [illegible] by section 13, article 5 of the Civil [illegible] volved upon them to produce the journal or show cause [illegible]

rima facie case made out by the respondent. ([illegible] v. City of Chicago, 115 Ill. 1[illegible], 1[illegible]4; City of [illegible] v. [illegible], [illegible] Ill. 414, 416.)

It is next contended by respondent that the court erred in finding that property should be zoned for Local Business. The evidence establishes that the property in question, (being the property for which Local Business classification is sought) constitutes the northerly part of a larger tract which for at least thirty years has been [illegible] the [illegible] which is known as the Stafford Tract. It is [illegible] in shape and is fronted [illegible] to [illegible] on its north side, which fronts on [illegible] Street, and [illegible] on Prospect Street and [illegible]. In 1928, Parcel 1, which is located at the southeast corner of the Stafford Tract, being a tract 100' x 1[illegible]', was zoned Local Business. This tract was changed [illegible] in 1937 from Local Business to [illegible]-Residential, and in 1941 it was changed to C-Residential. Some six hundred [illegible] lie adjacent to the east and southeast of the property for which a Local Business classification is sought, and [illegible] tract comprising the [illegible]-Residential zone. Petitioners' property is at the intersection of [illegible] and Prospect Street and is located at the southeast corner thereof. [illegible] occupy the three remaining corners of the intersection. Thus we have the situation presented of a [illegible] residential [illegible] on one side of the street and the beginning of a commercial [illegible] on the other side. In determining what is the proper zoning classification under such circumstances, there are certain rules and standards to be adhered to as announced in the decisions of our courts. In LaSalle National Bank v. City of Chicago, 4 Ill. 2d. [illegible]53 at page 256, the court said: "We have previously held in many

occasions that there is a presumption of validity and fact of a zoning ordinance to the burden of the party attacking the ordinance is invalid or arbitrary as applied to the property. (Sunnyslope Land Co., Inc. v. Village of Glenview, 4[illegible] Ill. [illegible], 9[illegible] N.E. 2d 144; [illegible] v. City of Belleville, 36[illegible] Ill. 78, 4[illegible] N.E. 2d, 947.) The same principles apply to amendatory ordinances. (Kinsey v. City of Highland Park, 411 Ill. 34, 103 N.E. 2d., 472; Trust Company of Chicago v. City of Chicago, 408 Ill. 1, 96 N.E. 2d., 4[illegible].) The court is not free to substitute its judgment for that of the legislative body merely because reasonable minds may differ as to the propriety of a classification, the legislative judgment is not wholly beyond judicial review. Harms Building Corp. v. City of Chicago, 3 Ill. 2d., 96, 119 N.E. 2d., 7[illegible]; Lundman v. City of Evanston, 4[illegible] Ill. 410, 61 N.E. 2d. 3[illegible].'

In deciding what is the proper classification for any given piece of property, the case of Bartlett v. County of [illegible], 406 Ill. 410, indicates that the extent of the area affected in which the property involved is located, the existing classification and use of nearby property, the extent to which property values will be diminished by the zoning restrictions involved, and the extent to which the public need will be benefited by the proposed limitation upon the individual property, are matters to be considered in determining whether zoning classification is proper and correct. In Bartlett v. Village of [illegible], 406 Ill. at page 410, it is said: "It is realistic that zoning must begin somewhere and end somewhere. One piece of property in a commercial zone must be near, or even adjoin, property in a residential zone. The very nature of a zoning ordinance requires that certain desirable neighborhoods adjoin others which are less desirable. (Kennedy v. City of Evanston, 408 Ill. 246). The mere fact,

however, the plaintiff is the owner of property ten to fifty feet from the north boundary line of commercial property situated between the alley and Roosevelt Road, is not sufficient to show the invalidity of the ordinance as to her property. Such is located in that portion of the block north of the alley which is zoned for single-family residence purposes. Ninety per cent of the property in question is surrounded and otherwise adjacent to the immediate neighborhood used for single-family residences. [illegible] The fixing of zoning lines is a matter of legislative discretion and necessarily results in a different classification of uses on either side of the line. Where there exists a limitation on use of property near the boundary line an ordinance restricting district unreasonable and invalid. [illegible] can not an ordinance be justified simply because certain individuals benefit, but only because the public welfare requires it."

From the testimony introduced by the petitioners, it appears their position is that the zoning ordinance should be permitted on their request to because of the existence of a small business classification across the street so because their property would be more valuable if it could be used for local business. The evidence shows that for residential purposes petitioners' property is worth sixty dollars per foot and for commercial purposes two-hundred dollars per foot. The real basis for the opinions expressed by the witnesses for the petitioners was that the petitioners could realize a larger profit from their property if it were used for commercial rather than

residential purposes. [illegible] is sufficient to overcome the fact, [illegible] discloses, that petitioners' property, [illegible] an area which has been classified [illegible] residential for [illegible] thirty years. (Lincoln National Bank v. City of Chicago, 4 Ill. 2d. 252, 256.) The most that can be said in favor of petitioners' position is that the evidence presented [illegible] concerning the reasonableness of the zoning classification set aside for their property, and the law is that when a zoning classification is reasonably debatable and open to a difference of opinion, the court should not and will not interfere with the legislative judgment of the city council or other governmental legislative body as to the classification established. (Lincoln National Bank v. City of Chicago, 4 Ill. 2d. 252; Pioneer v. City of Highland Park, 3 Ill. 2d. 206; Ingram v. Buck, 4 Ill. 2d. 67; Burns v. City of Chicago, 406 Ill. 427.) Both the petitioners in the Lincoln National Bank case and the petitioners in the present case attack a classification on the ground that the surrounding area is entirely residential, and both of them involve facts similar to those presented in this case, and in both of them the reviewing court held that the court should not substitute its judgment for that of the legislative body charged with the duty, in the first instance, of zoning the classification where the matter is reasonably open to a difference of opinion. In the Lincoln National case, [illegible] at page 256, the court stated: "The facts are that except for several minor deviations, the surrounding area is entirely residential. Whether the proposed use in question would be beneficial was a matter of dispute, as the testimony of several witnesses is conflicting and residents of the area testified for both the plaintiff and the defendant. It is our considered opinion that the trial court should not have substituted its judgment for that

of th[illegible] city council."

[illegible] in the briefs [illegible] in the [illegible] of this controversy [illegible] trial court [illegible] injunction [illegible].

Judgment [illegible]

EOVALDI, J. Concurs.

Abstract

General No. 10830 6 L.A.2d 4 Agenda No. 5.

IN THE

SUPREME COURT OF ILLINOIS

NORTH GRAND DIVISION

May Term, A. D. 1956

John J. Murray, Jr., Plaintiff-Appellee, vs. John A. Murray, Thomas Murray, Jeanette Murray and Mary A. Murray, Defendants-Appellees, and Robert A. Murray, Defendant-Appellant.	Appeal from Appellate Court for the Second District.

DAVIS, J.

On June 19, 1946, John J. Murray executed his will which, following his death on April 1, 1947, was duly admitted to probate by the Probate Court of LaSalle County. As far as this litigation is concerned, the fourth clause of the will is the only portion thereof involved. This clause is as follows, viz.:

"FOURTH--I do hereby give and devise unto my beloved daughters, Anna J. Murray and Mary A. Murray, the East Eighty (80) acres of the Southwest Quarter (S.W. ¼) of Section Twenty-two (22), Township Thirty-four (34), North, Range Three (3) East of the Third Principal Meridian, LaSalle County, Illinois, subject to the life estate of my said wife and subject

to a right of way to and from the Northwest Quarter (N.W. ¼) of said Southeast Quarter (S.E. ¼), such right of way to be in such place as to least interfere with the convenience of my said daughters; and I do hereby subject this devise to the further condition that in case my said daughters, Anna J. Murry and Mary E. Murry, shall at any time elect to sell said land, any one or more of my sons shall have the first right to purchase the same, at two hundred fifty ($250.00) Dollars per acre; but if none of my said sons shall so elect, then and in such event, my said daughters are relieved from such requirement."

The testator was survived by his wife, Sarah E. Murry, and in addition to his said daughters, Anna and Mary, he also left three other daughters, Sarah E. Corcoran, Margaret I. Shern and Catherine A. Brown, and also Robert E. Murry, Thomas E. Murry, John J. Murry, Jr. and James F. Murry, his sons. His widow, Sarah E. Murry, died shortly after the death of her husband and the daughter, Anna J. Murry, died June 1, 1951. At the time of her death she and her sister, Mary E. Murry, were the owners of the premises described in the fourth clause of their father's will. By her will, Anna J. Murry devised her undivided interest therein to John J. Murry, Jr., who on February 27, 1953, filed the instant complaint in the Circuit Court of LaSalle County for the partition of this eighty acre tract and for the construction of the fourth clause of his father's will. The Complaint alleged that the plaintiff and Pearce Murry owned the land in common, subject to the right of Mary E. Murry to live in the house during her lifetime, but that the brothers of the plaintiff might claim some right therein

because of the l nguage of their father' . l. T. c l nt made Thomas . urry, Robert . urry, James . urry, Pearce urry and Mary T. urry riler defendant. The defendants, Thomas M. Murry, Pearce urry and ry . urry answered admitting the allegations of the complaint. James M. urry defaulted. Robert A. Murry filed his answer denying that the land was owned by the plaintiff and Pearce urry as alleged in the complaint and filed a counterclaim. In his counterclaim, he alleged that the devise made by the will of Anne J. urry, to her brother, John J. urry, Jr., of her undivided interest in this eighty acre tract, was void because it deprived counterclaimant of his right and interest in the premises as provided by the will of his father; that the conveyance by . urry to Pearce T. urry was fraud, without adequate consideration and designed, one to deprive counterclaimant of his legal and testamentary right to purchase s. rroll, at $250.00 per acre and that he tendered to the court entitled thereto the sum of $250.00 per acre for the interest in the premises to which the court may find that he is justly and lawfully entitled to purchase under the provisions of his father's will.

The counterclaim further alleged that it was the intention of the testator to vest the first son who offered to tender the sum of $250.00 per acre with the option or privilege to purchase said premises; that counterclaimant is a son of John J. Murry and being the first to offer to buy said premises at $250.00 per acre, he should be entitled to do so. The counterclaim prayed for a construction of the fourth paragraph of the will of John J. Murry and ~~determine~~ the rights and interests of the counterclaimant to the premises and his right to purchase the same and that the court also determine the

legality of the transfer by the will of John J. Murry of her interest to John J. Murry, Jr. and the legality of the sale of the interest of Mary F. Murry to Pearce Murry.

To this counterclaim the plaintiff, John J. Murry, Jr. replied that the condition contained in the fourth clause of the will of John J. Murry was an invalid restraint against alienation and was void. Counter-defendant, Pearce Murry, in his reply to the counterclaim denied that the conveyance by Mary F. Murry was a sham conveyance or without adequate consideration or done to deprive counter-plaintiff of any rights which he might have in said property and set up that Thomas F. Murry purchased the one-half undivided interest from Mary F. Murry for a valuable consideration and gave the same to his son, Pearce Murry and concluded that since the actual purchaser was a son of John J. Murry, the testator, the condition contained in the fourth clause of his will was complied with.

The cause was heard by the chancellor resulting in a decree finding that Mary F. Murry was entitled to the life use of the dwelling house upon the premises involved in this proceeding; that she, Mary F. Murry, elected to sell her interest in said premises to Thomas F. Murry and he, the said Thomas F. Murry, elected to purchase her undivided interest in said premises and that he did in fact purchase the same for a consideration of $1000.00 in compliance with the provisions of the fourth clause of said will; that at the request and direction of the said Thomas F. Murry, the said Mary F. Murry conveyed her undivided interest in said land to the defendant, Pearce Murry, a son of the said Thomas F. Murry. The decree further found that Anna J. Murry did not in her lifetime elect to sell her undivided one-half interest in said land and that she had full power and right to dispose of her interest therein by will and that the

fourth clause of the will of her father did not restrict her from making a devise of her interest in said real estate to her brother, John J. Murry, Jr., plaintiff herein. The decree found that plaintiff, John J. Murry, Jr., and the defendant, Pearce Murry, were tenants in common of the premises involved herein, each owning an undivided one-half thereof subject to the life use of the house by Mary E. Murry. The decree granted the prayer of the complaint and appointed commissioners to make partition of the premises as found by the decree. To reverse this decree, Robert . Murry, defendant and cross-complainant appeals.

Counsel for appellant insists that Mary E. Murry signified her intention of selling her interest in the premises involved herein by conveying the same to Pearce Murry; that Pearce Murry is not a son of the testator and therefore she did not comply with the condition imposed upon the devise of these premises to her by her father's will. Counsel further insists that appellant is a son of the testator, had a right to purchase the interest of Mary E. Murry, if she elected to sell. Counsel for appellee, ~~John J. Murry, Jr.~~, insists that the provision of the will of the testator was complied with because Thomas F. Murry is a son of the testator and he was the actual purchaser from Mary E. Murry of her interest in this land. Counsel further insists that the language of the will required an election to sell by both devisees, Anna J. Murry and Mary E. Murry; that upon the death of Anna J. Murry the terms of the restraint were rendered inoperative being incapable of performance. It is also insisted by this appellee that the language employed by the testator in devising these premises to his daughters created an unreasonable restraint of their inherent right of alienation and was therefore illegal and void.

The evidence [illegible] prior to October 19, 1951, [illegible] John J. Murry, Jr.] [illegible] daughter, Mary J. Murry, [illegible] seventy-three years of age, [illegible] wished to buy her interest in the property involved in the proceeding and told her that in accordance with her father's will she was entitled to a life estate therein, but that he would give her $[illegible] for her interest. Mary J. Murry replied that she [illegible] not be bothered, but executed a deed to the premises reserving to herself the use of the dwelling house thereon during her lifetime. The deed was delivered to her brother, John J. Murry, Jr., at the request named therein by Grace Murry, [illegible] John J. Murry, Jr. The consideration stated in the deed, John J. Murry, Jr., to his sister, Mary J. Murry, for the conveyance was $[illegible]. Of this amount $[illegible] was paid in cash and the balance for which a note, dated October 19, 1951, was given to the order of Mary J. Murry with 4% interest per annum after date, was delivered to Mary J. Murry and delivered to Mary J. Murry was by her left in the custody of her attorney and [illegible] attorney at the time of the hearing of this matter although she had been paid the interest thereon [illegible].

The evidence further discloses that this seventy-acre tract of land was improved by a dwelling house and outbuildings prior to the death of John J. Murry, Sr., and the family resided. After the death of the father the mother the daughters, Mary J. and Anna J. Murry, lived there [illegible] after the death of Anna J. at the time of the conveyance to Grace Murry on October 19, 1951, John J. Murry, Jr. and his sister, Mary J. Murry, were living on the premises. Grace Murry was not present at the time Mary J. Murry executed the deed and delivered it to his father, John J. Murry, Jr. and was not advised thereof until sometime later

October 19, 1951.

Counsel for appellant concede that the evidence and that the consideration for this conveyance was paid by Thomas . Murry, but counsel insists that the deed, containing the recital to pierce Murry must be accepted as it is and that its terms cannot be contradicted by parol evidence and evidence that the entire consideration was furnished by Miller, Thomas . Murry, was improperly admitted. Counsel for Miller insists that Thomas . Murry was the actual purchaser of Mary . Murry's interest in this land and as he was a person of the last two, the condition found in the fourth clause of the will has been complied with. Counsel argue that the facts disclosed by this record are analogous to a situation where a resulting trust has been held to be created where a purchaser of real estate pays the consideration therefore, but causes the title to be transferred from the seller to someone other than the person who furnishes the consideration (Reynolds v. Harr, 150 Ill. 294; Donlin v. Bradley, 119 Ill. 541; Scherer v. Scherer, 179 Ill. 11) and where it appears that the grantee named in such a deed is a child of the person furnishing the purchase money, there is a rebuttable presumption that the deed constitutes a gift from such person to the grantee. (Hartley v. Hartley, 279 Ill. 543; Francis v. Wilkinson, 147 Ill. 370; Link v. Marion, 146 Ill. 335; Cook v. Blazis, 268 Ill. 615)

In the instant case Thomas . Murry advanced the total consideration for the purchase of Mary . Murry's interest in this land. His son, Pierce Murry, was named as grantee in the deed. The deed was delivered by the grantor to the father. The son was not present and knew nothing of the transaction until after its completion. Evidence of these undisputed facts was admissible. The parol evidence rule was not violated thereby and

under the foregoing authorities there is a presumption that Thomas . urry intended this conveyance to be a gift to his son. There is no evidence in this record to rebut that presumption and the evidence is that Thomas . urry did in fact intend this conveyance of the premises described therein to be a gift from him to his son. ounsel for appellee has argued that full compliance with the provisions of the fourth clause of this will requires the joint action of all of the daughters and that when one of the sisters died the restraint became inoperative. hat the test for sale in the will is , --- in order that daughters, nna J. urry and ary . urry, may at any time elect to sell such land, or any part or parcel of same, and shall have the right to purchase the same at appraised value." ited their father intended the restraint to apply in the event only one of the daughters should desire to sell her interest, he could easily have said so. The test to be applied by the language employed is that this restraint should apply only in the event both daughters decided to sell the land. The death of nna J. urry rendered this impossible of performance and left only the restraint then became inoperative. Irrespective of this contention we are satisfied that the evidence sustains the finding of the chancellor and that Thomas . urry was the actual owner of the premises and that the condition in the fourth clause of the will of John J. urry, if valid, has been complied with.

There is no merit in appellee's contention that Thomas . urry is estopped from asserting that the deed was made to him simply because he directed that the deed be made to his son, Pearce, and the chancellor did not err in admitting in evidence the testimony of the facts and circumstances attending and upon the execution of the conveyance by . urry. The portion of the decree appealed from will be affirmed.

Decree affirmed.

Foster, J. Concurs

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a term of the Appellate Court, begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and fifty-five, within and for the Second District of Illinois:

Present -- Honorable FRANKLIN R. DOVE, Presiding Justice
Honorable DEWITT S. CROW, Justice
Honorable BENEDICT W. EOVALDI, Justice
JUSTUS L. JOHNSON, Clerk
EDWARD R. LAMBERT, Sheriff

Be it Remembered, That, to-wit: On the 4th day of August, A. D. 1955, certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

General No. 10830 Agenda No. 5

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1955

JOHN J. MURRY, Jr., Plaintiff-Appellee vs. JAMES E. MURRY, THOMAS W. MURRY, PEARCE MURRY and MARY E. MURRY, Defendants-Appellees, and ROBERT W. MURRY, Defendant-Appellant.	)	Appeal from the Circuit Court of LaSalle County

O R D E R

It is Ordered that the opinion in the above-entitled cause, filed herein on July 22, 1955, be amended and corrected as follows, viz.:

On the third line from the bottom of page 3, strike the word "determine" which follows the word "and" and which is before the word "the" and in lieu thereof insert the following words, viz.: "for a determination of" so that ~~the~~ line will read as so amended: "of the will of John J. Murry and for a determination of the rights and."

In the twelfth line from the bottom of page 5, strike the name "John J. Murry, Jr.," and insert in lieu thereof the name "Pearce Murry."

In the 2nd line from the top of page 6 of the opinion, strike the name "John J. Murry, Jr.," and insert in lieu thereof the name "Thomas W. Murry."

In lines, eleven, twelve and thirteen of page 6 of the opinion, strike the names "John J. Murry, Jr.," and insert in lieu thereof the name "Thomas W. Murry."

In the last line on page 6 of the opinion, strike the abbreviation "Jr." following the name "Murry", and at the end of the 2nd line from the bottom of page 6 strike the name and initial "John J." and insert in lieu thereof "Thomas W."

(Signed DeWitt S. Crow
Justice
(Signed) B. W. Eovaldi
Justice
(Signed) F. R. Dove
Justice

Abstract

General No. 10868 — Error No. 4.

In the

Supreme Court

of

the State of Illinois

May Term, A. D. 1948

6 Ill. 2d 411

The People of the State of Illinois, ex rel, Mid-Continent Petroleum Corporation, a corporation; Leslie C. Payne; Virgie Payne; Clifford Griffey; Thomas Vincent Griffey; Ellen Griffey; and Carrie C. Buck,

Petitioners-Plaintiffs,

vs.

The City of Vienna, Illinois, a Municipal Corporation; Pierce J. Packer, Mayor of the City of Vienna, Illinois, a Municipal Corporation; Clyde E. Vinnedge, Charles E. Barth, Paul E. Johnson, Albert Perkins, Councilmen of the City of Vienna, Illinois, a Municipal Corporation; and James L. Johnson, City Manager of the City of Vienna, Illinois, a Municipal Corporation,

Defendants-Plaintiffs.

LOVE, J.

Mid-Continent Petroleum Corporation, a corporation, and five property owners filed their petition in the Circuit Court of Carroll County, against the City of Vienna, Illinois, a Municipal Corporation, its Mayor, Councilmen and City Manager praying for a writ of mandamus, which would require the defendants to approve the plot plans, plans and specifications of the corporation plaintiff theretofore submitted to the defendants and to issue its permit in accordance with the application of

this plaintiff for the construction and maintenance of a gasoline service station on a described tract of land at the northeast corner of the intersection of [illegible] streets in the City of Savanna.

The five property owners, who joined in the petition, are the record title holders of the real estate upon which it is proposed to build the service station and the corporation plaintiff has an option from them to purchase said property. The defendants filed their answer and the issues made by the pleadings were submitted to the Chancellor, who entered the writ as prayed. To reverse that judgment, defendants appeal.

The petition alleged that the City of Savanna does not have any zoning ordinance, building code ordinance, electrical code ordinance or fire limits zone ordinance part aining to service station or any ordinance pertaining to the construction and operation of a service station or any ordinance part aining to, or regulating the storage of combustibles. The petition made a copy of Ordinance No. 6 4 of the City of Savanna part thereof and further alleged that on October 16, 196 , in accordance with its provisions the corporate petitioner applied to defendants in writing for a permit to construct and maintain upon the location involved certain service station and to make the necessary curb and sidewalk cuts and driveways for such station; that the plot plans, plans and specifications for such station, had been approved by the ~~the~~ Department of Public Welfare and by the Illinois State Fire Marshall and that the application for a permit so recited; that no objection was made by the city either to the form or sufficiency of the application or to the plot plans, plans and specifications, which accompanied the application for a permit; that at the council

meeting of said city of October [illegible], 1953, the council disapproved said application for permit, but took no action thereon; that at the meeting of the city council on November [illegible], 195[illegible], a motion was unanimously passed that the request to construct the service station at the location in question be not granted on the grounds that if so located it would constitute a traffic, pedestrian and fire hazard and would limit to five parking meter stalls and also decrease the property value.

It was then alleged that on February 5, 1954, corporate petitioner filed a request with the city to have the council reconsider its application for permit; that said request to reconsider was taken up by the city council on February 8, 1954, but was tabled and on March 8, 1954, at a meeting of the council, it was moved and unanimously carried that the permit be refused, but no reasons were given for the refusal thereof. It was then alleged that the action of the city council in refusing to grant the permit was arbitrary, unreasonable, capricious and without any lawful authority under the ordinances of the City of Dawsons or the statutes of the State of Illinois.

By their answer, the defendants admitted most of the facts alleged in the petition, but denied that the petitioners had complied with all of the ordinances of the City of Dawsons and denied that the refusal of the city council to grant the permit was arbitrary, unreasonable, capricious or without lawful authority, and set up, as a special defense, that the erection of a filling station on the premises in question would result in traffic and pedestrian hazards there, and for those reasons the city had a right to prohibit the erection of a filling station at this location.

The record discloses that the City of Savanna had a population of 5,068 according to the Federal Census of 1950. It has no zoning ordinances, building code or electrical code prohibiting the erection of a service station at the place and of the type involved in this proceeding. Main Street, the principal business street of the city, runs north and south. Adams Street runs east and west, intersecting it at approximately right angles. Both are on a level at the intersection and there is no grade, incline or street elevation. The proposed filling station would be located on the northwest corner of the intersection of these streets on a rectangular-shaped lot of ground approximately one hundred feet north and south on Main Street and between fifty-eight and sixty feet east and west on Adams Street. There are two brick dwelling houses now standing on these premises, one was built in 1866, not presently occupied, and described by its owner as being in "terrible condition." The other dwelling is over one hundred years old and the owner testified its condition was neither "good or bad, but livable considering its age." The sidewalks on both Main and Adams Streets adjoining this site are rough, uneven, broken and in need of repairs. Main Street is a part of Illinois Highway Routes 80 and 64 and United States Route 52 as these routes pass through Savanna. At this intersection, Main Street is fifty-one feet wide from curb to curb and Adams Street is forty feet wide from curb to curb. Both streets are paved. West of Main Street there is no other street, but about one-half block away is a surfaced alley, which runs north and south parallel with Main Street. West of this alley are railroad tracks and the Mississippi River. There is no residential or business district west of Main Street. Adams Street extends two blocks east of the intersection and then comes to a dead end. About seventy-five

to [illegible] feet north of the proposed location of the service station on Main Street is a movie picture theatre and another theatre is located about 250 feet south of the corner. Both of these theatres are on the same side of the street. Small business buildings and business houses [illegible] in question to the north on the same side of the street. Smaller business buildings are also located south of the site. Two schools are located on Main Street. The closest school to the intersection is a grade school four blocks away and the other is a high school six blocks from the intersection. There is an electric "stop and go" signal at the intersection of Main Street and after this petition was filed with the Board, the City installed four or five parking meters in front of the location on which it is desired to erect the filling station.

The evidence further discloses that at the time of the hearing there were five gasoline service stations located on Main Street and also one drive-in serving lunches. Chicago Avenue is two blocks south of Main Street and on the corner of Main and Chicago Avenue a filling station is located having a driveway of 84 feet 7 inches on Main Street. There is also a Standard Oil service station two blocks north of Main Street on Main Street having a driveway of 58 feet on Main Street. One block north of this Standard Oil station is another service station on Main Street with two driveways on Main Street, each driveway being in excess of 40 feet on Main Street. One block further north is another gasoline service station on the west side of Main Street having a driveway of 110 feet on Main Street and there is still another service station on Main Street one block further north which has a driveway of 52 feet on Main Street. There is also a drive-in eating place six blocks north of the site of the proposed service station which is also on

the east side of Main Street having two driveways [illegible] sixty-six feet in width and extending along Main Street.

Evidence was also introduced to the effect that for the two-hour period between five o'clock and seven o'clock on the afternoon of August 27, 1954, 1455 cars, 183 trucks and 12 buses used the streets adjoining the premises in question and during the same period of time 382 pedestrians used the sidewalk on Main and Adams Street passing along said premises. Another count taken on August 28, 1954, between 6:15 and 6:45 of the evening of that day, revealed that 587 cars used the sidewalks along both sides of these premises and during the same period 3472 cars, 34 trucks and 7 buses traveled over Main Street and parked in front of the premises. Another traffic check made at the intersection of Adams and Main Streets covering the thirty-minute period beginning at 8:30 o'clock on the morning of November 9, 1953, disclosed that sixty cars proceeded north on Main Street, and in addition, seven cars and two trucks which were proceeding in a northerly direction turned east into Adams Street; that no vehicles going north on Main Street turned west into Adams Street; that 49 cars and 15 trucks during this period passed this intersection also south, two of which, turned west on Adams Street and two others turned west on Adams Street, but there were no cars during this period on Adams Street going east and turning north and no vehicles on Adams Street going west. The witness who made this count testified there was a total of 183 vehicles that passed the Main and Adams Street intersection during the thirty-minute period which he checked.

There is also evidence in the record to the effect that surveys at other locations show that about one per cent of the traffic going by a service station would enter that service

station and that about one-tenth of one per cent of the drivers of vehicles passing a service station ever turned left into a service station. Another witness testified that he was professor of Traffic Engineering at Iowa State College; that prior to the date of the hearing, he came to Ovanna, inspected the premises in question and the plans for the proposed service station to be erected thereon and it was his opinion that if the proposed station were erected "a traffic hazard greater than that which exists at the present would be created."

Ordinance Number 624 of the City of Ovanna was offered and admitted in evidence upon the hearing. This ordinance makes it unlawful for any person, firm, or corporation to enter upon curbs within the limits of the city without first obtaining a permit from the City Manager to do such work. In compliance with the provisions of this ordinance, appellee, Mid-Continent Petroleum Corporation, on October 16, 1953, filed its application for curb and sidewalk cuts for driveways for the proposed service station and also filed with the city its plot plans, plans and specifications, for its service station. This application, as well as the plans and specifications, called for curb and sidewalk cut of thirty-five feet on each street for a driveway and two curb and sidewalk cuts of thirty-five feet each on Main Street. Thereafter on October 22, 1953, a revised plot plan for the proposed service station was filed giving accurate dimensions of the proposed site and improvements. The City Council promptly denied the application for this permit and thereafter on March 8, 1954, refused to reconsider its former action and on the following day, April 9, 1954, the instant action was commenced. The reasons given by the Council for denying the permit was that the proposed filling station would constitute a traffic, pedestrian and fire hazard and

would eliminate five parking stalls and depreciate property values.

Counsel for appellants state that the most important question presented by this record is whether or not a municipality has the power to deny a service station the right to erect a driveway over sidewalks which are receiving extensive use. We have read this record with care, examined the plats and photographs offered and admitted in evidence and find no evidence that the erection of this service station would constitute a fire hazard or depreciate property values in the vicinity. It is true that there is considerable traffic along Main Street which passes this location, but the Chancellor, after hearing all the evidence concluded that while the traffic hazard at this intersection might be greater after the construction of this filling station than previously existed, still that hazard is not increased to such an extent as to endanger the public health, safety and general welfare. The evidence sustains this finding. The corporate petitioner made a proper application for a permit to cut the curbs and to erect a proposed station and substantially complied with the provisions of the applicable ordinance, and having so complied with its requirements, the matter of issuing the permit on the part of the city was not discretionary. (Rose Hardware v. City of Marion, 368 Ill. 513; People v. Van Cleeve, 182 Ill. 330.)

This is an action at law. The rights of the parties are determined according to the facts and circumstances existing at the time the action was commenced. The action of the city in erecting parking meters in front of the premises in question after the action was filed cannot effect the rights of appellees. (Hutchinson v. Coonley, 209 Ill. 437; 1 C.J.S. (Actions) 1390 Sec. 125b.)

The judgment of the Circuit Court of Carroll County is affirmed.

Judgment affirmed.

Corcoran, C. J.

Gen. No. 10833 Agenda No. 6

IN THE

APPELLATE COURT OF ILLINOIS

FOR THE

SECOND DISTRICT

MAY TERM, A. D. 1955.

WESTERN SAND AND GRAVEL COMPANY, a Corporation, Plaintiff, Appellee, vs. TOWN OF CORNWALL, Henry County, Illinois, Defendant, CHARLES SEARS, As Treasurer of the Town of Cornwall, Charles Sears, as Treasurer of the Road and Bridge Fund of the Town of Cornwall, Charles Sears, Individually, Defendants, MARTIN FARNAM, As Treasurer of the Road and Bridge Fund of the Town of Cornwall, Appellant.	Appeal from Circuit Court of Henry County, Illinois. ---

CROW, J.

This case grows out of a construction of a direction in a remanding order and mandate of the Supreme Court in WESTERN SAND AND GRAVEL COMPANY vs. TOWN OF CORNWALL, et al., 2 Ill. (2d) 560, disposing of a prior appeal. We quote directly from the mandate in that case as follows: "* * * * and this cause be remanded to the Circuit Court of Henry County with directions

to enter judgment forthe plaintiff against CHARLES SEARS and his successors in office as Treasurer of the Road and Bridge Fund of the Town of Cornwall, for $6,045.00. And - - the said appellant recover of and from the said appellees costs by them in this behalf expended, to be taxed, in due course of law".

A copy of the opinion of the Supreme Court was attached to the mandate and it will be helpful to quote the following extract therefrom, 2 Ill. (2d) 560, at p. 566-568:

" * * * * The remaining question presented is from whom, if anyone, plaintiff is entitled to recover. The defendant town of Cornwall denies liability on the grounds that its jurisdiction does not extend to roads and that it did not take nor receive any of the funds in question. While the invitation to bidders, form of proposal and form of contract all carry the name of "Town of Cornwall" or "Cornwall Township," it cannot be regarded as the offeree. The confusion as to parties appears to result from a misconception of township organization which provides for a clerk and treasurer serving in dual capacities. A town is a separate and distinct municipal corporation and has no power or authority over roads. The highway commissioner is a quasi-corporation having jurisdiction over township roads. (ILL. REV. STAT. 1943, CHAPS. 121 and 139; AMERICAN MEXICAN REFINING CO. v. WETZEL, 350 ILL. 575; PEOPLE EX REL. BOOK v. BALTIMORE AND OHIO RAILROAD CO., 322 ILL. 623.) Any reference in the contract documents to the Town or Township, other than to identify the geographical area or political subdivision wherein the roads were to be improved, must be regarded as surplusage. (PEOPLE ex rel. WARD v. ILLINOIS CENTRAL RAILROAD CO., 374 ILL. 92.) The funds involved, while converted by the defendant Sears, were not, according to the evidence, converted by him as ex-officio treasurer of the town of Cornwall. We are of the opinion that no cause of action exists against the town of Cornwall nor against the treasurer of the funds of said town as such.

It is assumed by counsel for the defendants that since the highway commissioner of the geographical area of Cornwall Township is not a party defendant no judgment can be entered payable from road and bridge funds. As a general rule a municipal corporation may not sue or be sued in the name of its officers or agents. Due to the peculiarity of township government in Illinois the treasurer of road funds is not an officer of the quasi-corporation represented in the office of highway commissioner. He is the exclusive collector and custodian of the funds

expendable for road purposes, while the highway commissioner has the authority only to expend, not receive, road funds. If this action was one based upon the acts of the highway commissioner, he, as a quasi-corporation, would be a necessary party. In this suit the treasurer of the road and bridge fund is one of the defendants and recovery is sought for his alleged conversion of funds. The action cannot be predicated upon the action of the highway commissioner since we have herein held that there was no acceptance of the proposal by him and that his later attempt to accept and forfeit was void.

This action must therefore be successful against the treasurer, not as an individual, since there was no conversion to his own use, but as treasurer of the road and bridge fund, and judgment should be entered against him in that capacity for $6045, the remaining amount of the deposit not heretofore paid plaintiff. Judgment may not be entered for interest since it is payable from municipal funds, although indirectly through the treasurer thereof. AMERICAN LINCOLN REFINING CO. v. METZEL, 350 ILL. 575."

On May 27, 1954, the mandate of the Supreme Court was filed with the Circuit Clerk of Henry County. On June 7, 1954, the cause was redocketed in the Circuit Court, pursuant to the plaintiff's motion therefor and for entry of judgment in accordance with the mandate, and judgment was then entered as follows: "in accordance with the directions of the Supreme Court of Illinois, it is ordered, adjudged, and decreed that the plaintiff, WESTERN SAND AND GRAVEL COMPANY, a Corporation, have and recover of the defendant CHARLES SEARS and his successors in office as Treasurer of the Road and Bridge Fund of the Town of Cornwall, Henry County, Illinois, the sum of six thousand forty-five dollars, together with its costs and charges in this behalf expended, and have execution therefor."

On June 7, 1954, execution was issued by the Circuit Clerk and placed in the hands of the Sheriff who served the same on June 11, 1954, on Martin Farnam, who was then Treasurer of the Road and Bridge Fund of the Town of Cornwall. This writ

was later returned by the Sheriff on November 29, 1954, with the notation "I, therefore, return this writ not satisfied."

On July 2, 1954, Martin Farnam, successor Treasurer as aforesaid, entered a special appearance in the Circuit Court of Henry County in the cause and moved to quash the execution and vacate the judgment upon the grounds that the Circuit Court has no jurisdiction to enter judgment against him for the reason he never was a party in any capacity in the cause in which judgment was entered, having been elected to office in April, 1949, during pendency of the suit, and that the Court had no jurisdiction to order the issuance of an execution against him in any capacity.

The Circuit Court on November 29, 1954, denied the motion of Martin Farnam to quash the execution and vacate the judgment.

The record indicates that the term of office of Charles Sears, former Treasurer of the Road and Bridge Fund, expired in April, 1949; that Martin Farnam was his duly elected and qualified successor in office; and that Martin Farnam, by specific name, was never made a party to the suit, or served with process.

The appellant, Martin Farnam, the successor Treasurer of the Road and Bridge Fund, questions the jurisdiction of the Circuit Court over him, says he should have been made a party by specific name, should have been served with process, and implies that he as a new defendant should have a right to defend and relitigate all issues raised in the complaint. It appears to us that the language of the mandate and opinion of the Supreme Court on the prior appeal are designed to impose the duty of paying the judgment involved on all officials, whoever the individual occupant may be, who hold the office of and act in the official capacity of Treasurer of the Road and Bridge Fund of the Town of Cornwall, and this certainly includes Martin Farnam in his

official capacity while holding that office. That the particular individual's name presently holding that office is Martin Farnam, instead of and as a successor to Charles Sears, seems immaterial. The liability being enforced by the judgment is not an individual liability but a liability against that official defendant, whoever he may be, in his official capacity, and it is payable solely from municipal funds, through the treasurer, and not from any individual funds of Martin Farnam or Charles Sears. The decision, mandate, and opinion of the Supreme Court is final and neither the Circuit Court or this Court can attempt to review or revise the same: [illegible] v. [illegible], 141 Ill. App. 442.

The judgment entered by the Circuit Court on June 7, 1954 was in conformity with the mandate of the Supreme Court, with the exception that the Circuit Court added to the judgment "and have execution therefor".

It is clear to us that the judgment of June 7, 1954 pursuant to the mandate of the Supreme Court should not have included the words "and have execution therefor". Those words were no part of the mandate, specifically, nor we believe by intendment, and we believe that it was error for the Court to include such in the judgment and to order execution thereon, and, for this reason and to that extent only, the order of November 29, 1954 must be reversed and the cause remanded.

We have considered the defendant's motion of the plaintiff to dismiss this appeal, which was taken with the case, and in view of our conclusions that motion will be denied.

The order of November 29, 1954 which denied the defendant's motion to quash the execution in question issued June 7, 1954 is reversed and this cause is remanded to the Circuit Court with directions to modify the judgment by expunging therefrom the

words "and" are exercise therefor".

[illegible] instructions.

[illegible]

General No. 10817 Agenda No. 10

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D. 1958

ALLAN ERLE VASENIUS, by his next friend, AARNE VASENIUS,
Plaintiff-Appellant,

vs.

VERNA KELTON,
Defendant-Appellee.

APPEAL FROM THE CIRCUIT COURT OF DuPAGE COUNTY.

EOVALDI, --- J.

Plaintiff, a minor child, brought suit in the Circuit Court of DuPage County to recover damages for an injury sustained by him when he was struck by an automobile driven by defendant. The jury returned a verdict in favor of defendant and plaintiff has appealed.

On this appeal, plaintiff contends that certain of the instructions given at the request of defendant were erroneous and that defendant's counsel made an improper, inflammatory and prejudicial argument to the jury.

At the time the accident occurred, plaintiff was ten years old, and was in the fifth grade at the Lisle Public School in Lisle, Illinois. This school is located on the east side of Main Street in said city. There was a fence along the western side

of the school with three gates at intervals therein. Immediately to the west of the fence is a parkway extending west for about 13 feet and from the western edge of the parkway a gravel shoulder extended west for about 11 feet up to the paved portion of Main Street. At about 3:30 P.M. on the day of the accident, defendant was driving her car along Main Street approaching from the north. As she approached the school, she saw plaintiff on a bicycle coming out of one of the gates and stop with one foot on the ground and the other foot on his bike. Defendant thought that plaintiff had stopped and, therefore, she proceeded on and when her car had reached a point a little past the gate, a passenger in defendant's car said "Look out, here he comes!" Immediately thereafter the accident occurred, resulting in personal injuries to plaintiff, the nature and extent of which are highly disputed. We do not believe it necessary to go into a further discussion of the facts, many of which are highly controverted, and the foregoing is intended simply as a general statement of the nature of the occurrence.

Defendant contends on this appeal that the evidence clearly showed that the jury's verdict was correct and that, therefore, even assuming that there were errors in said instructions, that the judgment should not be reversed. However, we have considered the evidence in the case and are of the opinion that the question of liability is not nearly so self evident as defendant contends. In other words, this is not such a clear case of non liability that this Court can say that the jury's verdict was the only proper one and that there would be no probability of another result upon the retrial of the case. We, therefore, find it necessary to determine whether the instructions complained of were improper and whether the giving of these instructions constituted reversible error.

At the request of the defendant, the Court gave each of the following instructions:

"Defendant's Instruction 1 is as follows:"

> 'If you believe from the evidence, under the instructions of the Court, that the degree of care required of said plaintiff for his own safety, as defined in these instructions, required him before crossing said street to look and ascertain whether the street was clear or whether an automobile was approaching, and if the jury believe from the evidence, under the instruction of the Court, that the plaintiff by the exercise of such care should have looked and ascertained whether the street was clear and whether or not an automobile was approaching, and if the jury believe, from the evidence, that the plaintiff, if he had looked, could by the exercise of ordinary care have ascertained whether or not an automobile was approaching, and if the jury further believe from the evidence, under the instructions of the Court, that the plaintiff did not so look and ascertain whether the street was clear or whether or not an automobile was approaching, and that he was injured in consequence of his failure to so look and ascertain, if he did so fail, then the Court instructs the jury to find the defendant not guilty.'

"Defendant's Instruction 9 is as follows:"

> 'If you believe, from the evidence, that the plaintiff, by using his faculties with ordinary and reasonable care, in looking out for danger, could have avoided injury on the occasion in question, and that he negligently failed to do so and thereby contributed to the injury, if you believe he was injured, then he cannot recover in this case.'

"Defendant's Instruction 10 is as follows:"

> 'The jury are instructed that even though they find from a preponderance of the evidence that the defendant was guilty of negligence which contributed to the injury in question, yet if they also believe from a preponderance of the evidence that the plaintiff could have avoided the injuries to himself by the exercise of ordinary care on his part, and that he did not exercise such care, then he cannot recover in this case, and on this question of care for his own safety, the burden of proof is upon the plaintiff.'

All of these instructions told the jury that plaintiff, a minor child, was required to use ordinary and reasonable care to avoid an accident. There is no question but what these instructions were erroneous. It is well settled in this State that a minor child, between seven and fourteen years of age, is only

required to exercise that degree of care and caution that a child of his age, intelligence, capacity and experience would exercise under the same or similar circumstances. (WOLCZEK vs PUBLIC SERVICE CO. 342 Ill. 482; MASKALIUNAS vs C. & W. I. R. R. CO. 318 Ill. 142; DEMING vs CITY OF CHICAGO, 321 Ill. 341).

It is also well settled that the giving of an erroneous instruction concerning the degree of care to be exercised by a minor child is reversible error. (ILLINOIS IRON AND METAL CO. vs WEBER, 196 Ill. 526; HUGHES vs MEDENDORP, 294 Ill. App. 424, LEVIN vs LAUTERBACH COAL & ICE CO., 329 Ill. App. 180).

Defendant contends, however, that, even assuming these instructions were erroneous, one of plaintiff's instructions correctly informed the jury that: "A boy of ten years of age is only required to exercise that degree of care and caution which boys of his age, capacity, intelligence and experience may reasonably be expected to use under like circumstances." Defendant argues that since the jury were instructed that the instructions were to be considered as one connected series and that they should not pick one instruction out and disregard the others, any errors in defendant's instructions were cured. Defendant also contends that since the Court instructed the jury, in defendant's instruction #2, that "ordinary care as used in these instructions means such care, caution and prudence as an ordinary prudent person of the age, years and experience of the plaintiff would exercise under similar circumstances", the jury could not have been misled by the giving of the above instruction which incorrectly defined the degree of care.

In our opinion the giving of defendant's instruction #2 was not sufficient to cure the error in defendant's instructions #1, 9 and 10. In the first place, the instruction only referred to

the "age, years and experience" of plaintiff and it is well settled that in determining whether minor plaintiff is guilty of contributory negligence, the jury must consider not only his age and experience but also his intelligence and capacity (FOWLER vs C. & E. I. R. R. CO., 234 Ill. 619). Moreover, when instructions are contradictory, the giving of a correct instruction will not cure the error in the erroneous instruction. As stated in ILLINOIS IRON AND METAL CO. vs WEBER, 196 Ill. 526, at page 531:

> "Even where instructions may supplement each other, each one must state the law correctly as far as it goes, and they should be in harmony, so that the jury may not be misled. They are not able to select from contradictory instructions one which correctly states the law. It is obvious that where the jury were told to find the defendant guilty if they found that plaintiff was in the exercise of ordinary care for a boy of his age, even if some other rule was given in another instruction, it would be impossible for the jury to decide which one to follow and impossible for us to determine which one they did follow."

We are of the opinion that in the instant case it would be extremely difficult for the jury to select from the conflicting instructions the ones which properly state the law or to read defendant's instructions #1, 9 and 10 and realize that they had to modify the term "ordinary care" contained therein so as to mean "such care, caution and prudence as an ordinary prudent person of the age, years and experience of the plaintiff would exercise under similar circumstances", as stated in defendant's instruction #2. Nor could they be expected to disregard these instructions and apply the correct standard which was set forth in plaintiff's instruction. Because of these erroneous instructions, the judgment of the Trial Court must be reversed and the cause remanded for a new trial.

Plaintiff also contends in this appeal that certain portions of defendant's counsel's arguments to the jury were

improper. No objections were raised in the Trial Court to the arguments and that contention, therefore, cannot be considered on appeal.

For the reasons stated in this opinion the judgment of the Circuit Court of DuPage County is reversed and the cause is remanded for a new trial.

CASE REVERSED AND CAUSE REMANDED.

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